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Supreme Court, U.S.
FILED
NOV 3 1993
OFFICE OF THE CLERK

No. 93-5209

In The

Supreme Court of the United States

October Term, 1993

DARREN J. CUSTIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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Maryland

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Petition For Certiorari Filed July 15, 1993
Certiorari Granted October 12, 1993

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158 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment 3

Notice/Information of Enhanced Penalty 6

Indictment (redacted copy) 8

Transcript of Proceedings, Circuit Court for Baltimore City, December 11, 1985 10

Transcript of Proceedings, Circuit Court for Baltimore County, October 17, 1989 43

Transcript of Sentencing, March 6, 1992 49

Judgment and Sentence, March 6, 1992 117

United States v. Custis, 786 F. Supp. 533 (D. Md. 1992) 124

United States v. Custis, 988 F.2d 1355 (4th Cir. 1993) (opinion and order denying rehearing) 135

Order of Supreme Court of the United States Granting Certiorari limited to Question 1 Presented by the Petition and Leave to Proceed in Forma Pauperis, October 12, 1993 156

RELEVANT DOCKET ENTRIES

Date	Proceedings
1991	
Sept. 11	Indictment filed
Sept. 12	Notice/Information of Enhanced Penalty
Sept. 27	Defendant Arraigned and pleaded not guilty as to Count Nos. 1-3
Nov. 18	Jury Trial - Day #1
Nov. 19	Jury Trial - Day #2
Nov. 20	Jury Trial - Day #3
Nov. 21	Verdict: Not guilty of the offense as charged in Count 1 but guilty of the lesser - included offense as to Count 1; not guilty as to Count 2; and guilty as to Count 3
1992	
Feb. 28	Letter/Order dated February 27, 1992 to counsel of record regarding the sentencing of defendant as therein set forth
March 5	Letter dated March 5, 1992 to counsel regarding prior convictions
March 6	Oral Motion of Defendant for a New Trial, for reasons stated in open court
March 9	Order that the defendant's oral motion for new trial is granted and his retrial will commence Monday, May 18, 1992 at 10:00 a.m.
March 9	Judgment as to defendant
March 17	Memorandum Opinion dated March 16, 1992 as to the defendant

March 25 Notice of Appeal of United States

March 27 Notice of Cross-Appeal of Defendant

1993

May 10 Judgment of the U.S. Court of Appeals for the Fourth Circuit, affirming in part and reversing in part, and remanding the case to the district court with instructions

May 11 Order that the order granting a new trial is hereby vacated and the defendant's commitment pursuant to the judgment of this Court on March 9, 1992, is hereby ratified and continued in force as therein set forth

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA v. DARREN J. CUSTIS a/k/a DARREN CURTIS a/k/a DARREN DODD	CRIMINAL NO. S-91-0334 (Distribution of Cocaine, 21 U.S.C. §841(a)(1); Possession of a Firearm by a Convicted Felon, 18 U.S.C. §922(g)(1); Possession of a Firearm in Connection With Drug Trafficking, 18 U.S.C. §924(c)(1).

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about July 1, 1991 in the State and District of Maryland:

DARREN J. CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, did knowingly and intentionally possess with the intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II Controlled Substance.

21 U.S.C. §841(a)(1)

COUNT II

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland,

DARREN J. CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, did knowingly and intentionally use and carry a firearm, that is one .38 caliber Smith & Wesson revolver, a serial nuraber ANE1954, during and in relation to a drug trafficking crime, that is, possession with intent to distribute cocaine, a Schedule II Controlled Substance.

18 U.S.C. §924(c)

COUNT III

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland

DARREN CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, burglary and robbery, did knowingly and unlawfully possess a firearm, that is, one .38 caliber Smith & Wesson revolver, serial number ANE1954, in or affecting commerce.

18 U.S.C. §922(g)(1)

Richard D. Bennett
United States Attorney

A TRUE BILL:

Foreperson

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. S-91-0334R

(Three Prior Violent Felony
or Serious Drug Convictions
Under Penalty Provisions of
18 U.S.C. § 924(e))

(Caption omitted in printing)

NOTICE/INFORMATION OF ENHANCED PENALTY

The United States Attorney for the District of Maryland charges:

1. On September 11, 1991, the Grant Jury for the District of Maryland returned a three-count indictment against the defendant, DARREN J. CUSTIS, a/k/a DARREN CURTIS, a/k/a DARREN DODD, charging him *inter alia* with the offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. Section 922(g)(1).

2. Prior to the return of the indictment, the defendant, DARREN J. CUSTIS, a/k/a DARREN CURTIS, a/k/a DARREN DODD, previously had been convicted of three separate violent felonies or serious drug offenses as set forth in 18 U.S.C. Section 924(e)(2)(B) and (C):

a. On or about December 11, 1985, the defendant was convicted of burglary in the Circuit Court for Baltimore City (Case No. 28506744) and received a sentence of eight years.

b. On or about October 17, 1989, the defendant was convicted of attempted burglary in the Circuit Court for Baltimore County (Case No. 86CR6828) and received a sentence of two years.

c. On or about June 10, 1985, the defendant was convicted of robbery in the court of Common Pleas of Adams County, Pennsylvania (Case No. CC-52-83) and received a sentence of not less than 22 months and not more than 44 months imprisonment.

3. As a result of three prior convictions described in paragraph 2 above, the defendant, DARREN J. CURTIS [sic], a/k/a DARREN CURTIS, a/k/a DARREN DODD, is subject to the enhanced punishment provisions of 18 U.S.C. Section 924 (e) and can be fined not more than $250,000.00, and shall be imprisoned not less than 15 years and, further, the Court shall not suspend any portion of said sentence nor shall the defendant be eligible for parole with respect to the sentence imposed herein.

18 U.S.C. § 924(e)

/s/ Richard D. Bennett
Richard D. Bennett
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted In Printing)

CRIMINAL NO. S-91-0334-R
(Distribution of Cocaine, 21 U.S.C. §841(a)(1); Possession of a Firearm by a Convicted Felon, 18 U.S.C. §922(g)(1); Possession of a Firearm in Connection With Drug Trafficking, 18 U.S.C. §§ 924(c)(1)

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about July 1, 1991 in the State and District of Maryland:

DARREN J. CUSTIS

the defendant herein, did knowingly and intentionally possess with the intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II Controlled Substance.

21 U.S.C. §841(a)(1)

COUNT II

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland,

DARREN J. CUSTIS

the defendant herein, did knowingly and intentionally use and carry a firearm, that is one .38 caliber Smith &

Wesson revolver, serial number ANE1954, during and in relation to a drug trafficking crime, that is, possession with intent to distribute cocaine, a Schedule II Controlled Substance.

18 U.S.C. §924(c)

COUNT III

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland

DARREN CUSTIS

the defendant herein, having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, one .38 caliber Smith & Wesson revolver, serial number ANE1954, in or affecting commerce.

18 U.S.C. §922(g)(1)

/s/ Richard D. Bennett
Richard D. Bennett
United States Attorney

A TRUE BILL:

/s/ Adrian Redd
Foreperson

/s/ September 11, 1991
Date

IN THE CIRCUIT COURT FOR BALTIMORE CITY,
MARYLAND
CRIMINAL DIVISION

STATE OF MARYLAND

VS. Case No. 28506744

DARRELL [sic] CUSTIS

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

Baltimore, Maryland
December 11, 1985

BEFORE:

HONORABLE MABEL H. HUBBARD, Judge

[2] PROCEEDINGS

MR. HONICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. HONICK: For the record, Gary Honick, Assistant State's Attorney. I am here in the matter of State v. Darren Custis who is charged in Criminal Information 28506744, burglary, and warrant 48514716 through 21 with theft over three hundred, possession of a short barrel shotgun, and possession of a handgun.

THE COURT: Counsel for the defendant, you are –

MR. GASTON: Audrey Gaston.

MR. HONICK: Your Honor, my understanding is this defendant is in the Baltimore City Jail at this time.

MS. GASTON: No, he is here.

THE CLERK: He is on his way.

MS. GASTON: He is on his way up to the courtroom, Your Honor.

THE COURT: Oh, I understand. Is there anything we can do without him? What's the possibility of a plea?

MR. HONICK: Your Honor, first of all, if the defendant, once he arrives, is willing to plead guilty, we could call the first count which is burglary, Criminal Information 23506744. As far as the warrant cases are [3] concerned, we would be calling the theft over $300 and possession of a short barrel shotgun. The sentencing guidelines range has been affected by the fact we just discovered that one of the offenses, the one capitulating his prior criminal record, is actually a juvenile offense so his adult criminal record is changed from a major record to a minor record. So, instead of the range being from 12 to 20 years, it becomes two to eight years for the burglary alone. I am not counting what the effect of the theft over $300 and the short barrel shotgun would have on that. But this particular range seems to be acceptable to the defense without the defendant.

THE COURT: Excuse me?

MR. HONICK: This range of two to eight years for the burglary alone.

THE COURT: Is accapetable [sic] to the defendant?

MR. HONICK: Yes.

THE COURT: Is it acceptable to the State?

MR. HONICK: Well, I can present no reason that the range should exceed it. So, yes, it would be acceptable to the State as well.

THE COURT: What is the range for the other?

MR. HONICK: I have not worked it up. I just discovered it.

MS. GASTON: I thought we were working on both [4] of them at the same time.

THE COURT: All right. We have an overall range of two to eight under the matrix. For the theft over $300 is two to five. For the handgun violation is two. For the burglary is two to eight. I say handgun. What should you call it? Short barrel shotgun?

Mr. H: Short barrel shotgun.

THE COURT: Which would be two to five. You are not calling the handgun?

MR. HONICK: No.

THE COURT: As to the theft, handgun, or theft of a short barrel shotgun, they are the same incident?

MS. GASTON: Yes.

THE COURT: They are different, however, from the burglary?

MR. HONICK: That's correct.

THE COURT: Separate incident. Ms. Gaston, overall range, four to 13 years as overall range. Two to five for the theft, two to five for the short barrel shotgun, and two to eight for the burglary. Ovevall [sic] range, four to thirteen.

MS. GASTON: May it please the Court, I have had an opportunity to speak with my client and also the State's Attorney, and he would be willing to plead to two to eight burglary and two to five as to the theft, Alford [5] plea. I have spoken to the State's Attorney who agreed, I believe, to drop the possession charge. Is that correct?

THE COURT: Wait a minute. I understand that you are going forward on the theft and the burglary. Is that what you are saying?

MR. HONICK: That's right. I would be willing under these terms to not proceed on either the handgun violation or the possession of a short barrel shotgun but instead to proceed only with theft of the car and the burglary charge.

THE COURT: And what is the State asking?

MR. HONICK: Your Honor, we're asking for the maximum time on the matrix.

THE COURT: Maximum under the matrix?

MR. HONICK: Yes.

THE COURT: That means eight years for the burglary and five years for the theft; is that correct?

MR. HONICK: Yes.

THE COURT: All right. Are you asking for consecutive sentences?

MR. HONICK: Yes, Your Honor.

THE COURT: All right. Defense has leave to argue for less?

MR. HONICK: Yes. And we also understand that the plea to the theft, not the burglary, the plea to the [6] theft only would be an Alford plea. And the State has no objection to that.

THE COURT: All right. As to the burglary, there is a guilty plea; is that correct, or not?

MS. GASTON: Yes, Your Honor.

THE COURT: All right. The Court finds that acceptable.

MR. HONICK: Your Honor, it would be Criminal Information 28504744, the first count which charges burglary, and Warrant Number 48514716 which charges theft.

THE COURT: All right. Young man, I am going to ask you to stand, come over to the witness stand, raise your right hand and be sworn.

Thereupon,

DARREN CUSTIS

having been called as a witness and having been first duly sworn by the Deputy Clerk, was examined, and testified as follows:

THE CLERK: Speak into the mic. [sic] State your name and your last home address for the record, please.

THE DEFENDANT: Darren Custis, 3706 Fernhill Avenue.

THE COURT: Ms. Gaston, would you qualify your client, please?

MS. GASTON: Mr. Custis, you understand the [7] nature of the offense that you have been charged with?

THE DEFENDANT: Yes.

MS. GASTON: You are competent and understand fully that you are pleading guilty and waiving your right to a full trial in the burglary proceeding?

THE DEFENDANT: Under what?

MS. GASTON: Do you understand fully that you have a right to a trial before a jury in the burglary case and that you are thereby waiving it by entering your guilty plea?

THE DEFENDANT: Yes.

MS. GASTON: Do you do this voluntarily?

THE DEFENDANT: Yes.

MS. GASTON: Have you been advised by counsel?

THE DEFENDANT: Yes.

MS. GASTON: Do you feel satisfied as to your explanation? If you don't –

THE DEFENDANT: Yes – well, as far as right now, I don't fully understand everything that's going on as far as –

THE COURT: Let me go over it for you. You have been charged with the burglary of a dwelling, that is, breaking and entering of a dewlling [sic] in the night time without the permission of the owner and with the attempt to steal, take, and carry away the owner's propety [sic] or with [8] the intent to commit a felony. That's what burglary is. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: And you have been charged with that burglary. Who is the alleged victim, Mr. Honick?

MR. HONICK: Leon Troop, Your Honor. He is seated in court.

THE COURT: His address?

MR. HONICK: 3818 Fernhill Avenue.

THE COURT: That's the address of the person whom you are accused to having committed a burglary. Do youunderstand [sic] that, sir?

THE DEFENDANT: Yes.

THE COURT: Mr. Honick, please, the owner of the property he is alleged to have stolen as to the theft, sir?

MR. HONICK: Jerome Floyd, Your Honor.

THE COURT: What is he alleged to have stolen from Jerome Floyd?

MR. HONICK: A 1979 Datsun 280Z.

THE COURT: '79 Datsun 280Z?

MR. HONICK: Yes. That's not correct?

MS. GASTON: Is this in the burglary case? Your Honor, I thought we were speaking of the burglary.

THE COURT: Well, we're going to qualify him [9] with the guilty plea as to both.

MS. GASTON: All right. Fine.

THE COURT: One is the Alford plea and the other is a guilty plea. What we want to do is move along. The burglary is alleged to have occurred at 3918 Fernhill Avenue?

MS. GASTON: Correct.

THE COURT: The theft is alleged to have occurred from a one Jerome Floyd and the object of that theft was a '79 Datsun 280Z. Is that correct?

MS. GASTON: That's correct, Your Honor.

THE COURT: The maximum penalty for that grand theft, Mr. Honick?

MR. HONICK: Fifteen years.

THE COURT: The maximum penalty for burglary begin 20 years; is that correct?

MR. HONICK: That's correct.

THE COURT: Plus possible fines.

MR. HONICK: That's correct.

THE COURT: Do you understand that, young man?

THE DEFENDANT: Yes.

THE COURT: And you are pleading gulty [sic] to both. As to the burglary, you are saying, I did that. As to the theft of the 280Z, you are saying, I am not admitting that I did it but I am acknowledging the State has enough [10] evidence to probably result in a guilty finding. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Based on the State's evidence, I am willing now to enter this plea not admitting my guilt but hoping to get a lesser sentence than if I had gone to trial.

THE DEFENDANT: I understand.

THE COURT: Do you understand that? All right. First of all, let me ask you how old you are.

THE DEFENDANT: 20.

THE COURT: How fardid [sic] you go to school?

THE DEFENDANT: 11th grade.

THE COURT: Can you read and write?

THE DEFENDANT: Yes.

THE COURT: I ask you have you ever been under the care of a psychiatrist or a patient in a mental institution?

THE DEFENDANT: I have been under the care of a psychiatrist.

THE COURT: When was that?

THE DEFENDANT: '81 or '82.

THE COURT: Was that a private psychiatrist or was that at a –

THE DEFENDANT: Sinai Hospital.

[11] THE COURT: All right. Do you know the nature of your ailment?

THE DEFENDANT: No. It is nothing the matter with me.

THE COURT: Well, when you went to the psychiatrist, what was your ailment if you know?

THE DEFENDANT: Well, it was requested by the State that I see psychiatrist to make sure I was okay.

THE COURT: Well, how long did you see the psychiatrist?

THE DEFENDANT: About two months.

THE COURT: All right. Let me ask you now. Do you have any difficulty understanding the proceedings today?

THE DEFENDANT: No.

THE COURT: You know exactly what is going on?

THE DEFENDANT: As far as you have explained it.

THE COURT: Now, do you know that you are in court and you know you are pleading guilty and you know you are entering Alford plea; is that right?

THE DEFENDANT: Yes.

THE COURT: Let me explain to you, sir, when you enter a guilty plea, you give up certain constitutional rights. The first right you give up is a [12] right to be tried by the Court or by a jury. If the Court were to try you, I would make the decision as to the facts, I or another judge. If I found you guilty, then I would have to find you guilty by a standard of beyond a reasonable doubt and to a moral certainty. The State would present its witnesses. Ms. Gaston on your behalf would have a right to cross-examine those witnesses. It is called confrontation. And she could ask the questions of the State's witnesses to make sure they were telling the truth, had their stories straight. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had trial by a jury or court, you would have a chance to call witnesses yourself and if you were not able to call those witnesses, we would have what's called compulsory process and you could ask the Court to summons those witnesses for you who could testify on your behalf and say Darren Custis didn't do that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had a trial by a court or jury, you would have an opportunity to testify in your own behalf, take the stand and tell your story. If you chose to testify in your own behalf, the State's Attorney

or the Court could inquire into your criminal background since [13] you were 18 years old when you were represented by an attorney as to the crimes of what we call moral turpitude. That's crimes that show bad character, fraud, theft, perjury, that sort of thing. The only reason for that question is to help the Court or the jury decide whether to believe you as a witness based on the kind of things you've done in the past. Do you understnad [sic] that?

THE DEFENDANT: Yes.

THE COURT: If you had a trial, you would have a right to remain silent and if it were the Court, the Court would understand your right to remain silent with no inference of guilty from your silence, the court couldn't say, he must be trying to hide something becuase [sic] he doesn't want to testify. It couldn't do that. Instead it could simply decide the case based on all the other evidence present and any arguments presented by the State's Attorney and your counsel. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had a jury trial, the Court would instruct the jury to make no inference whatever from the fact that he exercised his constitutional right to remain silent. All right?

THE DEFENDANT: Yes.

THE COURT: Now, as I have said, you have a [14] right to the Court trial and you have a right to a jury trial in which 12 men and women would be chosen from the voter's registration rolls of Baltimore City by the

State's Attorney, by Ms. Gaston with your help, and those 12 men and women could be young and old, black and white Oriental, Native American, they may be a cross section of the community. And they also would have to decide your guilt by a standard of beyond a reasonable doubt and to a moral certianty [sic]. And their decision would have to be unanimous. That is, every single one of them would have to say you are guilty before you could be convicted or every single one of them would have to sy [sic] you wre [sic] innocent before you could be acquitted. And anything in between is called a hung jury. The judge declares a mistrial. But at that point the State's Attorney has an option. He could retry on you on the case or he could dismiss the case against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty, you are giving up both a court trial and a jury trial. Do you undestand [sic] it?

THE DEFENDANT: Yes.

THE COURT: What you are saying is it is accpetable [sic] for the State to read into the record the facts and you are agreeing as the burglary that those are the [15] facts. That's exactly what happened. As to the Alford plea, the theft, you are saying, well, I don't agree that's what happened but I agree that if the State's witnesses were called, that's what they would testify to. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I will have a chance to make some minor additions, deletions, or corrections, but you would not have a chance to present anywitnesses [sic] or to testify in your own defense. You are agreeing that's all the evidence the Court is going to get before deciding whether or not you are guilty. And the probability is that the State's statement of facts will be sufficient to find you guilty of both charges. Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: All right. Now, young man, I ask you whether you have had any drugs, alcohol, medication in the past 24 to 48 hours that might cloud your thinking today.

THE DEFENDANT: No.

THE COURT: You know exactly where you are and what you are doing?

THE DEFENDANT: Yes.

THE COURT: Has anybody forced you or threatened you orany [sic] member of your family or made an [16] promises to you aside from the plea agreement in order to make you undertake these pleadings?

THE DEFENDANT: No. Well, I didn't understand as far as the plea agreement, as far as what they were saying two to five, two to eight. I don't understand that.

THE COURT: What that means was under the sentencing guidelines, you should receive no more than two years and no more than five years for the theft if you are found guilty.

THE DEFENDANT: Yes.

THE COURT: And under the sentencing guidelines which most judges in this state are trying to follow, you shouldn't be sentenced to any less than two years or any more than eight years for the burglary, even though the maximum sentence for burglary in the lawbook, in the statute is 20 years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that sentencing guildine [sic] is an individual guideline. It is only ours. It is not anybody else's. And it is based on all of your background, your age, the number of crimes you may or may not have committed in the past. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When we add it all together, we [17] come out with certain numbers and those numbers are a minimum of two, maximum of eight, for burglary, minimum of two, a maximum of five for theft. That's what that means.

THE DEFENDANT: All right.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand the maximum for burglary is 20 years, the maximum for theft is 15 years, and if you went to trial and you were found gulty [sic], the judge could give you 35 years? Is that clear to you?

THE DEFENDANT: I understand.

THE COURT: All right. If you plead not guilty, even if you are found guilty, you have an absolute right to appeal to the Court of Special Appeals. But if you plead guilty, you limit your right to appeal. And that you are left not with an automatic appeal but a right to petition the Court for leave to appeal. And they can say no. And if you petition the Court of Special Appeals for leave to appeal, when you can onnly [sic] petition on four grounds. The first ground is that your plea was not voluntarily given, not given knowingly, intelligently, and voluntarily. And that is the reason that am asking you all these questions, to make sure that you are doing this voluntarily, of you own free will, and that you understand what you are doing by entering this plea. Now, [18] I ask you, sir, is this plea voluntarily given?

THE DEFENDANT: Yes.

THE COURT: No one forced you to give it?

THE DEFENDANT: No.

THE COURT: You are in your right mind right now and you know what you are doing; is that right?

THE DEFENDANT: Yes.

THE COURT: The second ground for appeal is that the Court gave you an illegal sentence. Now, I have told you that the Court can give you 35 years and I guarantee you that I am not going ti [sic] give you 35 years. So, anything less than 35 years is not an illegal sentence. I have agreed that I am not going to give you more than eight years for the burglary or more than five years for the theft. Do you understand that?

THE DEFENDANT: (Nods head affirmatively)

THE COURT: So, if you appeal on the voluntariness of your plea or appeal on the illegality of your sentence, you wouldn't win your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The third area under which you can appeal is the jurisdiction of the Court. I have the jurisdiction to hear any case that arose in Baltimore City and that was perpetrated by a person who was 18 years old [19] or older. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So, you wouldn't win on that ground either. Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: The last ground on which you can appeal is the competence of your counsel, that is, Ms. Gaston. So, I ask you now, sir, are you satisfied with the services that Ms. Gaston has give you?

THE DEFENDANT: Yes.

THE COURT: All right. Has she confererd [sic] with you on several occasions, talked with you?

THE DEFENDANT: Yes.

THE COURT: Has she given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?

THE DEFENDANT: Somewhat.

THE COURT: Has she told you in the past the pssible [sic] defense you might have in this case?

THE DEFENDANT: No.

THE COURT: She has not told you what defenses you might have had or that you didn't have any?

THE DEFENDANT: No.

THE COURT: Has she discussed the case with you?

[20] THE DEFENDANT: Yes, somewhat but it's been confusing.

THE COURT: What's been confusing?

THE DEFENDANT: The whole thing really has been confusing.

THE COURT: Do you have any family member here?

THE DEFENDANT: Yes.

THE COURT: Have the family members talked with your attorney?

THE DEFENDANT: yes.

THE COURT: All right. And you had another attorney before Ms. Gaston; is that right?

THE DEFENDANT: Yes, I did.

THE COURT: When did you secure the services of Ms. Gaston?

THE DEFENDANT: A while ago.

THE COURT: Well, I don't known what a while ago is.

THE CLERK: Your Honor, the file indicates that the appearance of Edwin Smith, Jr. was stricken on June 14 of '85 befeore [sic] Judge Johnson.

THE COURT: Does it say when Ms. Gaston entered her appearance?

MS. GASTON: I was in court on that date, I believe.

[21] THE CLERK: June 14th?

MS. GASTON: No, I am sorry, before Judge Johnson on a forfeiture hearing.

THE CLERK: On September 9, 1985, the bail forfeiture was stricken and the defendant was remanded to the Baltimore City Jail in lieu of no bail status. Is that the day you were before ~~Judge~~ Johnson?

MS. GASTON: Yes. And now the defendant has been incarcerated in Adams County, Pennsylvania, Your Honor, and has just been back in Baltmore [sic] City since –

THE CLERK: October 19th.

THE COURT: All right. I have to ask you whether or not you are satisfied with the services of your attorney.

THE DEFENDANT: Yes.

THE COURT: Has your attorney done the things youv'e [sic] asked her to do?

THE DEFENDANT: Yes.

THE COURT: And are you satisfied that she understands the law and has applied the law in this case on your behalf?

THE DEFENDANT: Yes.

THE COURT: So having said that, the propbability [sic] is you would not be able to win if you appealed on the competency of your counsel. Do you [22] understand that?

THE DEFENDANT: Yes.

THE COURT: Sir, are there any questions you want the [sic] ask the court about this plea?

THE DEFENDANT: Well, if it is possible, could I speak with my attorney for maybe a mintue [sic] or two before I make the plea?

THE COURT: All right. Step down.

All right. You have had a chance to confer again with Ms. Gaston; is that right?

THE DEFENDANT: Yes.

THE COURT: Sir, I ask whether or not it is still your intention to plead guilty.

THE DEFENDANT: Yes.

THE COURT: As to the burglary charge, you enter an Alford plea as to the theft charge; is that right?

THE DEFENDANT: Yes.

THE COURT: I ask you as the burglary charge, sir, are you entering the guilty plea becuase [sic] you are in fact guilty?

THE DEFENDANT: Yes.

THE COURT: As to the theft charge, are you entering the guilty plea on your Alford because you

believe the State has enough evidence which if produced [23] would result in a finding of guilty?

THE DEFENDANT: Yes.

THE COURT: I ask you to step down, sir. The Court is satisfied with the qualifications as to each charge. Mr. Honick?

MR. HONICK: Your Honor, I first would cite the statement of facts with reference to the burglary charge. That would be as follows: That on January 15, 1985, Leon Truitt and family lived at 3918 Fernhill Avenue which was located in the City of Baltimore. At about 6:30 p.m. on that date, after it was dark outside, Renee Truitt who is Mr. Truitt's daughter who lives at that address was in ehr [sic] second floor bedroom talking on the telephone when she heard the sound of shattering glass on the first floor. She tiptoed downstairs, so to speak, to see what was going on and saw someone who she would today identify as the defendant seated at trial table to the left of counsel running from the first floor center hallway, open the front door, and run outsisde [sic] the house. She would testify that she was positive that it was the defendant because not only did she get a good look at him but she has basically known the defendant since they were little children. So, her identification was positive. She, in that is, Miss Truitt was able to observe that the front sliding glass door in the home had been broken and that there was [24] glass from those windows all over the floor of the house. She then called the police.

Officer Burkhardt of the Baltimore City Police Department, Northwestern District, responded to this call. He came, made an investiation [sic] and found, first

of all, a six-inch by twelve-inch cinderblock chunk near the broken glass. That was apparently what was used to break the glass to the sliding doors. And by consulting with Mr.. Leon Truitt, who is the owner of the house, owner of its contents, was able to determine that various prooperty [sic] had been taken, in particular, seven Ivory Oriental statutes [sic] which had an accummulative [sic] value of $2,000.

THE COURT: Seven Oriental statutes.

MR. HONICK: Ivory Oriental statutes [sic] which had a total value of $2,000. Now, othermembers [sic] of the Truitt family, well, another member of the Truitt family, Lyles Truitt is another son of Leon Truitt. His girlfriend, Sheila Grandison, and their friend, Robert Lee and Robert Johnson, happened to be coming up the street in their car when the defendant came out of the house and randown [sic] the street, and they also had known the defendant for many years. They were also able to get a look at him when they came out the house and positively identify him. Everyone would testify that the defendant had no permission to be in the house at the time and they had no reason to believe [25] he would go in. They had no knowledge of his, had not given him permission and had no reason to know why he did this.

Officer Burkhardt, continuing her investigation, found a car at the 3800 block of Fernhill Avenue, a 1988 stationwagon with Maryland license plates, ELE44 which was registered to one Erlene Dawn of 3706 Fernhill Avenue. This is the mother of the defendant. And this particular station wagon, when inspected, was found to contain

both of the antique Ivory statutes [sic] that were taken from the house.

Mrs. Dawn reported to Officer Burkhardt that her son, the defendant, had a set of keys to the car but was not permitted to use the car. I should say that all the antique statues except for one which was valued at $200, were recovered and one is still missing and that the damage to the sliding glass doors amunted [sic] to approximately $700 worth. That would be the statement of facts as to the burglary.

THE COURT: All right. What if any changes to that statement of facts, Ms. Gaston?

MS. GASTON: Just, in application, I would like to state for the record that while the defendant had been drinking and did admit he didn't know what he was doing, that these were friends, that the defendant did turn [26] himself in to the police authorities. And while he has admitted going into the victim's home without permission, that they were friends of the defendant and that his motive, if he had testified, would have been that he did so through motivation to recover money for a debt, not only by the son who was his friend but also a debt owed to him by the father, Mr. Truitt.

I would like to further state that it does not appear that the damage to the glass door was not covered by insurance.

THE COURT: All right. The second statement of facts, Mr. Honick?

MR. HONICK: Yes, this would be as follows: On April 22, 1985, Mr. Jerome Floyd reported that his –

THE COURT: Jerome Floyd?

MR. HONICK: Yes, He reported that his 1979 Datsun 230Z was stolen from the 3200 block of Brightwood Avenue in Baltimore City. On April 24, 1985 at about 11:35 p.m., Miss Adrian Hankins who is the brother in law of Mr. Floyd –

THE COURT: I thought you said Miss.

MR. HONICK: It is not one of my days.

THE COURT: But it is a lady or a man?

MR. HONICK: As you can see, it is a –

THE COURT: Oh, all right. Thank you, ma'am, [27] A-d-r-i-e-n-n-e.

MR. HONICK: A-d-r-i-a-n.

THE COURT: All right.

MR. HONICK: Sorry about that, your Honor. At any rate, she observed the car, she recognized the car she saw at the 4000 block of Liberty Heights Avenue in Baltimore City. She saw two people dirving. [sic] She would identify the defendant seated at trial table.

THE COURT: She saw two people driving?

MR. HONICK: Well, one person driving.

THE COURT: All right. two people in the car.

MR. HONICK: She would identify the defendnat [sic] seated at the trial table as the passenger in the front seat. The car pulled up to the curb of the 2700 block of Gwynn Oak Avenue near Liberty Heights Avenue and the two occupants, the defendant being the

passenger and the other person driving, got out of the car and went into a sub shop.

THE COURT: I am sorry. I didn't hear what you said last.

MR. HONICK: The two people got out of the car and went into a sub shop at Liberty Heights Avenue. Miss Hankins notified the police and Officer Terry Murray of the Baltimore City Police Department, Northwestern District, came, detained the two people who got out of the [28] car, the defendant being one of these people, and placed them under arrest.

The car when inspected was found to have a opped [sic] ignition, was found to have been extremely altered from the way it was when taken two days earlier. Not only was the ignition itself popped out, hubcaps were missing, lights were either burned out or broken, it was in no condition to run at the time. It was a screw driver lying on the floor of the interior of the car and the car had to be towed away. Mr. Floyd is present in court today with bills that he had to incur as a result of this to rehabiitate [sic] the car to its status quo before this incident occurred and his total expenses which have been reimbursed by insurance were $1800.

THE COURT: And you say they were covered or not?

MR. HONICK: They were covered. However, he would testify, if the case went to trial, that there was a tool set worth approximately $150 that was in the car and was missing when he got the car back. All these incidents

occurred in Baltimore City and that would be the statement of facts in reference to the theft charge.

THE COURT: Was that out of pocket loss of $150?

MR. HONICK: Yes.

[29] THE COURT: All right. Anything further?

MR. HONICK: No, your Honor.

THE COURT: What if any changes, Ms. Gaston?

MS. GASTON: Your Honor, the only application that I would like to make or requests for changes would be that the question of the witness' ability to identify both the driver and the passenger while driving down the street and the charges themselves given do not make it clear at all, nor do they make it clear that she saw the defendant exit from the vehicle in question and enter the restaurant, only that there were two, that the car was parked by thhe [sic] restaurant, I believe, and that there were two males in dark clothing inside.

THE COURT: That's not the statement of facts I heard, Ms. Gaston. The statement of facts I heard indicated, and I write myself notes, that Miss Adrian Hankins, sister of the owner of the car, saw the car in the 4600 block of Liberty Heights Avenue with two persons, that the defendant was a passenger in that vehicle, that the car pulled to the curb and around the 46 or 4700 block of Liberty Heights Avenue, that the two, that is, the driver and the defendant, got out, went into a sub shop, and Miss Floyd called the police and the police came and arrested both of these people. That was my understanding of the statement of facts. Did I miss something?

[30] MS. GASTON: I would stand corrected, Your honor, but I belive [sic] that at the time of arrest, I believe it was stated that the defenadnt [sic] here was supposed to have been the driver and the other one the passenger.

THE COURT: Well, that wasn't what I heard in the statement of facts. Is that your statement of facts, Mr. Honick?

MR. HONICK: Yes, Your Honor.

THE COURT: All right. Is there anything further, Ms. Gaston?

MS. GASTON: Nothing other than that, as the defendant has stated, he has not and was not the individual who was in the car at that time nor was he the individual in the reastaurant [sic] who was apprehended and arrested and charged for the alelged, [sic] that he did not commit the crime as alleged. Now, he does not feel he has an adequate defense.

THE COURT: All right. Mr. Custis, you understand albeit it is an Alford plea, it is equivalent to a guilty plea. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you understand that the same restriction on your right to appeal, that same limitation concerns this plea as the guilty plea. Do you understand?

THE DEFENDANT: I understand.

[31] THE COURT: All right. The Court enters the Alford plea. Could you stand, please? The Court has

accpeted [sic] the guilty plea and the Alford plea. Having accepted both, the Court enters a guilty verdict as to each and both the charges, those verdicts, we believe, being absolutely supported by the statement of facts as to each of the cases. Would you like to be heard in mitigation, Ms. Gaston?

MS. GASTON: Yes, I would, Your Honor.

THE COURT: Go ahead.

MS. GASTON: Your Honor, the defendant is 20 years of age. Since the age of 16, has been incarcerated, and I would ask this court to consider giving him a minimum sentence on both counts to run concurrently with the 44 months that he is now serving at Adams County Prison in Pennsylvania for the following reasons: Certainly, the defendant has shownsome [sic] rehabilitation and that he did cooperate with both the Baltimore County and the Baltimore City authorities in resolving a nmber [sic] of burglaries that had been open. Subsequent to his serving of time in Baltimore County, he was then returned to Pennsylvania for the charges alleged there. They were all committed by the same ring.

Mr. Custis is an individual who, I believe, needs a chance in society to come out. And as soon as [32] possible, after serving his debt to society, have the opportunity to try to fully rehabilitate his life and live a life of freedom and a productive life. Certainly, his family has attempted to stand behind him. I believe that his willingness to sign the detainers, to come down to be heard, to resolve these matters in the most expedient manner possible before this Court indicate his desire to get on with his life at some point.

While the crimes committed are grave, certainly, the mitigating circumstances that were set forth as to the burglary, I would ask the Court to consider and certainly contrary to the request of the prosecution, enter a minmum [sic] number of years to be served and that they be served concurrently.

THE COURT: Very well. Young man, you have what's called the right of alloucation [sic]. It means albeit Ms. Gaston can speak for you, you have the right to speak for yourself before the judge determines sentence. You don't have to speak but if you want to, now is the time. Is there anything you want to say?

THE DEFENDANT: Yes, Your Honor, I can lvie [sic] with, as far as the burglary, but I am not sure exactly what happened on the night of the burglary. I had been drinking. But on the night that I was arrested for that auto theft, I did not steal that car. Now, the only [33] reason –

THE COURT: Young man, we've been through all that, haven't we? I didn't ask you to stand up and protest your innocence because you have a right to trial by court or by jury to protest your innocence.

THE DEFENDANT: I understand.

THE COURT: Your choice was to go forward on an Alford plea. I don't know if I can explain it any better to you. I was confident that you understood it. So, now, this is not the time for you to protest your innocence. Time now is for you to talk tome [sic] and tell me why I shouldn't give you five years for the theft. Do you understand?

THE DEFENDANT: Well, all I can say is I didn't steal the car.

THE COURT: You want?

THE DEFENDANT: I know I have a long time to sit and wait and think, which I have been doing. It's not really too much I can say. All right?

THE COURT: Does the State wish to be heard. I am sorry. I didn't mean to cut you off. Is there anything else you wanted to say?

THE DEFENDANT: That's it.

THE COURT: Does the State wish to be heard?

MR. HONICK: Your Honor, this defendant has [34] gone through the entire juvenile system having been committed to the Juvenile Services institutions and escaped from Juvenile Services institutions for which he was convicted. And now here we are again not only with property crimes in the state of Maryland but a property crime in Pennsylvania which is similar to the ones that took place in Baltimore. Obviously, wer [sit] not dealing with the crime in Pennsylvania except to the extent that it demonstrates something about this person's general attitude towards other people's property and the rights of others. I reject and I urge the Court to reject the argument that he is a poor, innocent person who happened to have been drunk at the time of the burglary so he has no memory of what happened, because what happened, as the statement of facts demonstrates, what happened was very carefully carried out, breaking and entering and carrying away of several, not just one but several

antiques and then deposited in a very calculated way in a hiding place.

This is not the behavior of somebody who is so drunk he doesn't know what he is doing. This is somebody who knew what he was doing and has a record of doing these kinds of things and should be dealt with appropriately. What's appropriately? Appropriately, in the State's view, is that having beengiven [sic] the maximum, I use the word advisedly, benefit of the Juvenile rehabilitation system [35] and having utterly rejected them, not only by having haad [sic] to come back repeatedly to the juvenile institutions but also having escaped, having rejected what there wasto [sic] offer there but having escaped therefrom, the time now that he is an adult and now that he has demonstrated a persistence in abusing others and others' property as an adult, I think the time has come to deal harshly with this person. And that's why the State recommends that the Court not exceed the guidelines but rather impose the maximum sentence for him alongthe [sic] guidelines. And that's our position.

THE COURT: Young man, will you stand, please? Do you want to be heard further, Ms. Gaston?

MS. GASTON: Just one point of clarification, Your Honor. The distinction was that one was a theft ring and upon the commission of crime in Pennsylvania, he was retuned to the Maryland Training School for Boys. There was not an individual crime for which he was returned to the Maryland Training School. It was upon his arrest in Pennsylvania. And it was during his time serving or while being detained there that he did escape anddid [sic] get the 90 days served while he was there.

THE COURT: While he was in Pennsylvania?

MS. GASTON: Yes. The crime that was committed in Pennsylvania, they retuned him to Maryland to the [36] training school for. It was not for a separate crime again committed and again I would like to make the distinction between those times committed by the theft ring for which he did testify and cooperate wtih [sic] the State and the present burglary charge which involved a neighbor.

THE COURT: Why is he incarcerated for 44 months?

MS. GASTON: That was .he sentence of the Adams County Court.

THE COURT: What for?

MS. GASTON: On the same charge. It's been two years.

THE COURT: What was the charge?

MS. GASTON: The charge was robbery. He was an accomplice in a robbery and it was for that charge that he was sent back to Maryland.

THE COURT: All right. Young man, stand up. The Court having found you guilty of theft, the sentence is five years to the Division of Correction. The Court having found you guilty of burglary, the sentence is eight years to the Division of Correction, suspend three years, probationary period for three years, 36 months, upon release, supervised. Both sentences are to be concurrent and begins as of October 17, 1985 to run concurrent with the sentence presently served.

[37] You have an absolute right, young man, as I have indicated to you, to file within the next 30 days a motion for leave to appeal to the court of special Apepals [sic] on the grounds of appeal. Within the next 90 days, you may ask for reconsideration by this Court, that is, by way of modification and/or reduction of sentence. You have to do that in writing. Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right. Thank you.

MR. HONICK: Thank you, Your Honor.

(End of proceedings)

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

STATE OF MARYLAND

vs.

CASE NO.
86-CR-6828

DARREN JEFFERY
CUSTIS,

Defendant

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(Trial on the Merits)
VOLUME I of I

Towson, Maryland

October 17, 1989

BEFORE:

HONORABLE WILLIAM R. BUCHANAN, SR., Associate Judge

PAUL G. GRIFFIN
Official Court Reporter
Towson, Maryland 21204

[1-2] PROCEEDINGS

(The Defendant was present.)

MR. JACKSON: We will be proceeding on a not guilty statement of facts on the one charge, which charge is attempted burglary. Should Your Honor find the recitation of facts sufficient to convict the Defendant, the State will make a recommendation of a two year sentence to the Department of Corrections, that sentence being suspended in lieu of a term of probation to be set at the Court's discretion.

MS. PEYTON: That's correct. Jerri Peyton from the Public Defender's Office.

Mr. Custis, you have agreed to proceed in this fashion, pleading not guilty, and proceed on an agreed statement of facts. That means you are waiving your right to a jury trial.

Do you understand that a jury is twelve people chosen from the voter rolls of Baltimore County with your assistance and my help and that of the State's Attorney. Each one must be convinced beyond a reasonable doubt that you are indeed guilty of an attempted breaking and entering.

Do you wish to waive that right?

THE DEFENDANT: Yes.

MS. PEYTON: The State's Attorney will read a statement of charges to the record. You will not be able to cross-examine any witnesses. The State will not present any witnesses. [1-3] You will not present any defense other than any legal argument I might make.

Do you agree to proceed in this fashion?

THE DEFENDANT: Yes.

THE COURT: How long has be been in jail?

MS. PEYTON: Mr. Custis is doing a six and a half year sentence in the State of Pennsylvania right now. He's down here on an interstate detainer.

MR. JACKSON: Your Honor, it is agreed by and between the State of Maryland and the Defendant this is a true statement of facts. On February 4, 1985 at about

1:57 that afternoon, Officer Ciepiela of the Baltimore County Police Department was dispatched to 6831 Alter Street in Baltimore County, Maryland, reference to an attempted breaking and entering that just occurred.

Upon his arrival, he was met by Mr. Gardner who resides at that address in Baltimore County. Mr. Gardner informed the officer at approximately 1:45 p.m. that afternoon he was awakend [sic] by the sound of a rear side window in his house being broken. The window was then kicked out.

He advised there was two subjects involved. After he awoke, and checked it out, those two people saw him, and ran from the outside of the house around to the front of the house.

A neighbor, Mr. Gibbs, who resides at 6820 Alter Street, advised he observed two subjects run to a vehicle parked [1-4] in front of Mr. Gibbs' home. The vehicle left the scene, heading westbound on West Ridge Road toward Liberty Road. Mr. Gibbs described it as an older model Plymouth station wagon, maroon in color, displaying license ESL-542.

The officer ran a listing for that vehicle, and it came back listed to an Earlene, E-a-r-l-e-n-e, Dodd, D-o-d-d, who resides on Fernhill Avenue in Baltimore, Maryland.

On the 6th of February, 1985, the officer went to that address to interview the owner of the vehicle. The owner advised that on that date the car was being used by her son and his friend; her son being, Darren Custis. The description given by Ms. Dodd fit the description given by Mr. Gardner and Mr. Gibbs, the witnesses, of the

person who was attempting to kick out the window at Mr. Garner's house.

The officer on that same day made a record check of the Defendant, and was able to get a photo of the Defendant, and placed it in a photo array, showing the spread with five other look-a-likes to the victim, Mr. Gardner, and Mr. Gibbs.

On the 6th of February, 1985, he went to Mr. Gibbs' residence, and showed the photo spread to Mr. Gibbs. Mr. Gibbs identified the Defendant as being the person who he saw breaking in the window, and fleeing from the scene on that day.

That is the State's case, Your Honor.

MS. PEYTON: No additions or corrections, Your Honor. Make a motion for acquittal, and submit as to that and the [1-5] verdict.

THE COURT: Overruled. On that statement of facts the verdict is guilty.

MS. PEYTON: Your Honor, Mr. Custis is 24 years old. He is single. He does not have any children. He obtained his GED in 1988 while incarcerated at Huntington in Pennsylvania. He is currently serving a six and a half year sentence at the Pennsylvania State Detention Center.

He has apparently been an exemplary prisoner, and he has some certificates and things he would like to show Your Honor, while he has been in Pennsylvania, and is really making an effort to turn his life around.

THE COURT: What is the plea arrangement here on this case?

MS. PEYTON: Two years, suspended all but – well, two years, suspended.

THE COURT: That's it?

MS. PEYTON: Yes.

THE COURT: How much more time does he have to go in Pennsylvania?

THE DEFENDANT: I have served so far two and a half years.

THE COURT: What was that for?

THE DEFENDANT: Robbery and escape.

MS. PEYTON: He has four years to go.

[1-6] THE COURT: I see it's an 85 case. Where has it been?

MS. PEYTON: He has been the guest of Maryland and Pennsylvania for some time at various institutions.

THE COURT: They brought him all the way down here for this case?

MS. PEYTON: Yes, sir.

THE COURT: Two years to the Department of Correction, suspended, that's it. Waive costs.

MR. JACKSON: Is there a term of probation with that?

THE COURT: When am I going to put him on probation? He's got two years more to do. I won't even be here. Waive court costs.

MS. PEYTON: You have ten days from today's date to file a motion for new trial; thirty days within which to file for an appeal; ninety days to ask Judge Buchanan to revise his sentence. I would advise you that probably you do not want to do the latter. Each of these must be done in writing with the Clerk of the Circuit Court of this County. You can do these by contacting the Public Defender's Office for the State of Maryland.

Any questions?

THE DEFENDANT: No.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	)	NO. S-91-0334 CRIMINAL
VS.	)	
DARREN J. CUSTIS	)	

MARCH 6, 1992

BALTIMORE, MARYLAND

THE ABOVE ENTITLED CASE CAME ON FOR SENTENCING AND MOTION FOR NEW TRIAL BEFORE THE HONORABLE FREDERIC N. SMALKIN AT 9:30 A.M.

[2] PROCEEDINGS

THE COURT: CRIMINAL CASE NUMBER S-91-0334. WE WILL PROCEED AT THIS TIME WITH SENTENCING IN THIS CASE, UNITED STATES VERSUS DARREN CUSTIS.

MR. JOHNSTON, HAVE YOU HAD AN OPPORTUNITY TO READ THE PRE-SENTENCE INVESTIGATION REPORT?

MR. JOHNSTON: YES, I HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. AND HAVE YOU HAD AN OPPORTUNITY TO DISCUSS IT WITH YOUR CLIENT?

MR. JOHNSTON: YES, I HAVE.

THE COURT: MR. CUSTIS, HAVE YOU READ THE PRE-SENTENCE INVESTIGATION REPORT?

THE DEFENDANT: YES, SIR.

THE COURT: AND HAVE YOU DISCUSSED IT WITH YOUR ATTORNEY?

THE DEFENDANT: YES, SIR.

THE COURT: MR. JOHNSTON, IS THERE ANY MATTER OF FACT THAT NEEDS TO BE CLARIFIED FOR THE P.S.I. UNDER RULE 32, ANY DISPUTED FACTUAL ISSUE?

MR. JOHNSTON: NO DISPUTED FACTUAL ISSUES, YOUR HONOR, EXCEPT FOR THE ACCEPTANCE OF RESPONSIBILITY ISSUE, AND I DON'T THINK THAT IS A FACTUAL ISSUE.

THE COURT: NO, IT IS NOT. THAT IS NOT A RULE 32 FACTUAL ISSUE, CERTAINLY. I DON'T THINK IT IS, ANYWAY.

ALL RIGHT. LET'S GO ON, THEN, TO THE –

[3] MR. JOHNSTON: I WOULD ADD, YOUR HONOR, THE ONLY FACTUAL ISSUE I WOULD LIKE TO HAVE A CHANCE TO MAKE A RECORD ON TERMS OF THE ARMED CAREER CRIMINAL ACT APPLICABILITY IS MY CLIENT'S RELIANCE ON A LACK OF INFORMATION GIVEN BY HIS COUNSEL WITH RESPECT TO THE 1985 BURGLARY CONVICTION.

THE COURT: WELL, I'LL TELL YOU WHAT. I THOUGHT ABOUT THAT, AND I DON'T THINK I AM

EVEN GOING TO TAKE ANY EVIDENCE ON THAT, BECAUSE I DON'T WANT TO MAKE ALTERNATIVE FINDINGS. I WANT TO FORCE THE ISSUE IN THE FOURTH CIRCUIT.

MR. JOHNSTON: I THOUGHT THAT WAS THE COURT'S INTENTION.

THE COURT: RIGHT. I REALLY WANT TO FORCE THE ISSUE AND GET A DECISION ON THIS POINT IN THE FOURTH CIRCUIT. IF I AM MISTAKEN ABOUT THE SCOPE OF COLLATERAL REVIEW IN A 924(E), THEN OBVIOUSLY IT WILL OPEN IT UP TO TESTIMONY AND FINDINGS UNDER HOOPER V. GARRAGHTY, 845 F. 2D 471, FOURTH CIRCUIT.

SO, REALLY, WHAT I WILL DO IN ORDER TO – I WILL LISTEN TO ANY ARGUMENT ON IT IN A MINUTE, BUT I REALLY DON'T INTEND TO MAKE ANY FINDINGS ON THAT POINT, BECAUSE I REALLY DO WANT TO FORCE THE ISSUE ONE WAY OR THE OTHER IN THE FOURTH CIRCUIT AND GET SOME CLEAR DECISION FROM THEM ON WHAT TO DO ON THESE TRIGGERLOCK CASES WHERE THERE IS ENHANCEMENT SOUGHT.

MR. JOHNSTON: BUT, FOR THE RECORD, THE COURT IS OVERRULING MY REQUEST TO HAVE A HEARING AND HAVE MY CLIENT TESTIFY ON THAT ISSUE?

[4] THE COURT: YES, ON THE GROUND THAT, AS I HAVE INDICATED IN MY LETTER TO YOU OF MARCH 5, 1992 WITH ENCLOSURES, I BELIEVE THAT THE SCOPE OF COLLATERAL REVIEW IN A

924(E)CASE ON PRIOR CONVICTIONS STANDS ONLY TO WHETHER THERE WAS A GIDEON VIOLATION UNDER THE AUTHORITY I HAVE CITED IN THAT LETTER, WHICH I AM GOING TO INCORPORATE, OF COURSE, IN THE RECORD. I DIRECTED IT TO BE FILED IN THE COURT FILE.

I DON'T KNOW WHETHER IT HAS MADE IT IN YET, RON, OR NOT. DO YOU SHOW A LETTER OF MARCH 5, '92, WHICH WAS JUST SENT UP THERE YESTERDAY?

THE CLERK: I WILL CHECK.

THE COURT: WITH ENCLOSURES.

THE CLERK: IT'S NOT IN THERE YET. I WILL MAKE SURE IT IS IN THERE.

THE COURT: MAKE SURE IT IS IN THERE.

ANYWAY, LET'S PROCEED ON TO THE MATTER OF SENTENCING HERE.

WITH REGARD TO THE QUESTION OF ARMED CAREER CRIMINAL, WHAT POINTS DO YOU WISH TO MAKE IN CONNECTION WITH THE ARMED CAREER CRIMINAL PROVISION, MR. JOHNSTON, FOR THE RECORD?

MR. JOHNSTON: THE GOVERNMENT FILED A NOTICE OF ENHANCEMENT IN THIS CASE RELATED TO THREE PRIOR CONVICTIONS ON THE PART OF MY CLIENT. THERE WERE ONLY THREE THAT WERE NOTIFIED BY THE GOVERNMENT TO BE USED FOR PURPOSES OF ENHANCEMENT UNDER THE ARMED CAREER CRIMINAL ACT.

[5] THE COURT: OF COURSE, THAT'S NOT A STATUTORY NOTICE. THAT'S A COURTESY NOTICE UNDER SECTION 924(E).

MR. JOHNSTON: WELL, I THINK WE HAVE THE RIGHT TO RELY ON THE NOTICE THEY GIVE US IN TERMS OF OUR PREPARATION IN –

THE COURT: DO YOU MEAN IN TERMS OF ESTOPPING THE GOVERNMENT?

MR. JOHNSTON: YES, YOUR HONOR.

THE COURT: WELL, EXCEPT THAT I DON'T KNOW THAT IT IS NECESSARILY – I THINK IT IS UP TO THE COURT TO DETERMINE THE SENTENCE BASED ON ALL THE INFORMATION THAT'S BEFORE IT. IT'S NOT NECESSARILY THE GOVERNMENT'S BURDEN TO BRING IT FORTH.

IN ANY EVENT, GO AHEAD ON. IF YOU WANT TO DISCUSS JUST BASED ON THE THREE THAT WERE NOTICED TO YOU, GO AHEAD AND DO THAT.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

WITH RESPECT TO THE 1985 ROBBERY CONVICTION, WE HAVE ALREADY NOTIFIED BY THE COURT BY ROUND ABOUT WAY, BY LETTER TO THE PROBATION OFFICE, OF OUR OBJECTION TO THAT BEING USED UNDER THE ARMED CAREER CRIMINAL ACT BECAUSE HE WAS CONVICTED AS AN ACCOMPLICE.

WE HAVE NO CONSTITUTIONAL OBJECTIONS TO THAT CONVICTION, ONLY THAT AS AN ACCOMPLICE HE SHOULD BE TREATED DIFFERENTLY THAN

SOMEONE WHO IS CONVICTED AS A PRINCIPAL [6] UNDER THE ARMED CAREER CRIMINAL ACT. I HAVE NO AUTHORITY FOR THAT PROPOSITION. I DON'T KNOW THAT IT HAS EVEN BEEN DEALT WITH.

I DO, HOWEVER, WISH TOUCH OFFER AS DEFENDANT'S EXHIBIT NUMBER 1 A PLEA COLLOQUY TRANSCRIPT, WHICH INCLUDES THE DISCUSSION OF WHAT MY CLIENT WAS PLEADING TO AND THE FACT THAT HE WAS CONVICTED AS AN ACCOMPLICE.

THE COURT: WELL, LET ME TAKE A LOOK AT IT.

IS THERE A STATEMENT OF FACTS CONTAINED IN IT?

MR. JOHNSTON: I DON'T RECALL THAT OFF THE TOP OF MY HEAD, YOUR HONOR. I KNOW THERE WAS A DISCUSSION OF THE FACTS INVOLVED IN THE INCIDENT.

THE COURT: YES, THERE IS A STATEMENT OF FACTS, TWO PERSONS – THIS IS OXFORD, PENNSYLVANIA.

MR. JOHNSTON: WHAT PAGE ARE YOU ON, YOUR HONOR?

THE COURT: I'M ON PAGE FIVE. THERE IS A STATEMENT OF FACTS HERE. IT SAYS TWO PERSONS WEARING SKI MASKS, CARRYING LOADED WEAPONS, ENTERED THE OXFORD PHARMACY, DEMANDED MONEY AND DRUGS, WEAPONS WERE POINTED AT MR. MCCORKLE AND MRS. BAKER. NUMEROUS DRUGS, A BANK BAG WITH MONEY,

AND PERSONAL ITEMS WERE TAKEN. I AM SUMMARIZING OR PARAPHRASING. SHORTLY AFTER THE TWO PERPETRATORS LEFT THE STORE, THE VEHICLE WAS STOPPED IN HANOVER TOWNSHIP. AN OFFICER BECAME SUSPICIOUS AND PLACED MR. CUSTIS AND TWO OTHER PEOPLE UNDER ARREST. FURTHER SEARCH FOUND MOST, IF NOT ALL, OF THE [7] OBJECTS. MR. CUSTIS GAVE A STATEMENT INDICATING THAT HE WAS PRESENT AT THE TIME THE ROBBERY TOOK PLACE, BUT WAS NOT ONE OF THE TWO PERSONS WHO HAD GONE INTO THE PHARMACY, THAT MR. CUSTIS HAD GOTTEN A CALL FROM NORRIS INDICATING HE WANTED TO GO UP TO PENNSYLVANIA TO DO A ROBBERY. MR. CUSTIS AGREED TO LET HIS MOTHER'S CAR TO BE USED, AND ONE OF THE WEAPONS BELONGED TO HIS WEAPON TO HIS MOTHER. THE OTHER TWO PEOPLE ENTERED INTO THIS ROBBERY. MR. CUSTIS REMAINED IN THE CAR. WHEN THE OTHER TWO CAME OUT OF THE STORE, THEY TOOK OFF AND WERE PICKED UP IN HANOVER.

THAT IS THE STATEMENT OF FACTS, AND FURTHER ON PAGE EIGHT THE TRIAL JUDGE SAID THAT THE COMMONWEALTH WOULD HAVE TO PROVE THAT MR. CUSTIS ACTED AS AN ACCOMPLICE WITH A SPECIFIC INTENT TO AID MR. NORRIS AND MR. DASHIEL IN THE COMMISSION OF A ROBBERY.

DO YOU HAVE ANY AUTHORITY FOR YOUR PROPOSITION – YOU DON'T HAVE ANY AUTHORITY FOR YOUR PROPOSITION THAT, IF THE INDIVIDUAL WAS NOT A PRINCIPAL, THEN YOU CAN'T COUNT?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: I DON'T KNOWN OF ANY AUTHORITY ON THE POINT EITHER, EXCEPT THAT, IF IN FACT THERE IS ENOUGH ACCESSORYSHIP TO BE HELD AS A PRINCIPAL, WHICH APPARENTLY IT WAS IN THIS CASE, GIVEN THE NATURE OF THE OFFENSE AND THE NATURE OF THE CONVICTION THAT WAS ENTERED, THAT THE ROLE IN THE OFFENSE, WHETHER A PRINCIPAL OR ACCOMPLICE, IS THE SAME; [8] AND, OF COURSE, THAT IS THE FEDERAL SCHEME, AS WELL. THE FEDERAL SCHEME IS THAT, WHETHER YOU ARE A PRINCIPAL IN THE FIRST OR THE SECOND DEGREE, YOU ARE STILL – THE CRIMINAL LIABILITY IS THE SAME, AND I KNOW OF NO AUTHORITY UNDER THE ARMED CAREER CRIMINAL ACT THAT SAYS THAT A QUALIFYING CONVICTION MUST HAVE BEEN DONE BY THE DEFENDANT IN HIS ROLE AS A PRINCIPAL.

YOUR POINT IS MADE FOR THE RECORD. MY PLAIN READING OF THE STATUTE AND THE GUIDELINES AND THE TRANSCRIPT HERE IN EXHIBIT 1 WOULD INDICATE TO ME THAT THIS IS A QUALIFYING PREDICATE CONVICTION, BUT YOUR POINT IS NOTED FOR THE RECORD.

MR. JOHNSTON: IS EXHIBIT 1 ADMITTED?

THE COURT: YES, IT IS.

MARK IT IN, MR. CLERK, PLEASE.

MR. JOHNSTON: THAT IS ALL WE HAVE WITH RESPECT TO THE 1985 ROBBERY CONVICTION.

THE COURT: GO AHEAD.

MR. JOHNSTON: WITH RESPECT TO THE 1985 BURGLARY CONVICTION, THE ARGUMENTS MADE IN OUR MEMORANDUM THAT I SUBMITTED TO THE COURT, I WOULD LIKE TO PRESERVE THOSE TO THE FOR THE RECORD.

THE COURT: THEY ARE PRESERVED AND YOU HAVE MY VIEW ON THEM IN MY LETTER OF FEBRUARY 27; BUT, AGAIN, SINCE OBVIOUSLY THE TRANSCRIPT SHOWS YOU – SINCE YOU ARE ARGUING INEFFECTIVE COUNSEL, THERE WAS AN LAWYER THERE. SO, THE [9] TRANSCRIPT SHOWS THAT AS TO THE 1985 ROBBERY THERE WAS NO GIDEON VIOLATION; AND UNDER MY READING OF THE CASES AS PER MY MARCH 5 LETTER TO YOU, WHICH ENCLOSED THE MARCH 5 LETTER IN THE COOK CASE, WHICH FULLY SETS FORTH MY REASONING ON THIS, I WILL NOT CONSIDER A COLLATERAL ATTACK ON THIS CONVICTION AT THIS TIME, AND THEREFORE I WILL NOT MAKE FINDINGS WITH REGARD TO A STRICKLAND SIXTH AMENDMENT VIOLATION DURING THE PLEA PROCEEDING BECAUSE I DON'T THINK IT IS A COMPETENT ISSUE ON COLLATERAL ATTACK IN A 924(E) CASE.

MR. JOHNSTON: JUST FOR THE RECORD, THIS IS THE CONVICTION THAT WE WOULD HAVE LIKED TO HAVE PUT MR. CUSTIS ON TO TESTIFY THAT HE WOULD HAVE MADE THAT DEFENSE HAD HE BEEN MADE AWARE OF IT.

THE COURT: I COMPLETELY UNDERSTAND THAT, AND IF IN FACT I AM WRONG ABOUT WHAT THE SCOPE OF COLLATERAL REVIEW IS, IF IN FACT

IN A 924(E) CASE ANY ISSUE ON WHICH HABEAS CORPUS RELIEF OR 2255 RELIEF COULD BE GRANTED IS IN FACT COGNIZABLE IN ATTACKING A PREDICATE CONVICTION, IT OBVIOUSLY WILL REOPEN THE WHOLE THING, AND THEN I WILL HEAR FROM HIM DECIDE. THE GOVERNMENT MIGHT EVEN WANT TO CALL WITNESSES, ET CETERA, AT ANOTHER DATE IF WE HAVE TO RESENTENCE THIS GENTLEMAN.

MR. JOHNSTON: I DON'T MEAN TO BELABOR THIS POINT, YOUR HONOR, BUT MY CLIENT IS FACING AN AWFUL LOT OF TIME.

THE COURT: I KNOW THAT, AND I DON'T FAULT YOU FOR RAISING IT, BUT I FELT THAT THERE IS NO DEFINITIVE AUTHORITY [10] IN THIS CIRCUIT OR DISTRICT ON THIS POINT. I ASSUME YOU HAVE READ MY LETTER.

MR. JOHNSTON: YES, I HAVE.

THE COURT: HAVE YOU TURNED UP ANYTHING CONTRA TO THAT?

MR. JOHNSTON: I HAVEN'T HAD TIME. I GOT YOUR LETTER ON THE 5TH AND I HAD DUTY THAT DAY.

THE COURT: I UNDERSTAND THAT. I DON'T THINK THERE IS ANY. I MEAN, I LOOKED AT IT VERY CAREFULLY.

IN FACT, WHAT I AM GOING TO DO IS PROBABLY TURN IT INTO A BRIEF MEMORANDUM OPINION AND JUST GO AHEAD AND FILE IT IN HERE SO THAT IT CAN BE FILED.

OKAY. GO AHEAD ON.

MR. JOHNSTON: WITH RESPECT TO THE THIRD CONVICTION, THAT IS, THE ATTEMPTED – WHAT THE GOVERNMENT REFERS TO –

THE COURT: UNDERSTANDING THAT ON APPEAL YOU HAVE OBVIOUSLY THE RIGHT TO CHALLENGE MY REASONING ON ANY GROUND, LEGAL REASONING ON IT.

OKAY. GO AHEAD.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

WITH RESPECT TO THE 1989 WHAT THE GOVERNMENT REFERS TO AS ATTEMPTED BURGLARY CONVICTION, I WOULD AGAIN LIKE TO REASSERT THOSE POINTS RAISED IN MY MEMORANDUM THAT THE COURT RULED ON BY LETTER.

THE COURT: ALL RIGHT. WELL, AGAIN, THE RECORD SHOWS [11] OBVIOUSLY HE WAS REPRESENTED BY AN ATTORNEY. IT WAS A STATEMENT OF FACTS, NOT GUILTY PLEA CASE, AND THERE IS NO GIDEON VIOLATION THERE.

MR. JOHNSTON: IN ADDITION, I WOULD LIKE TO OFFER DEFENDANT'S EXHIBIT NUMBER 2, WHICH IS THE ENTIRE COURT RECORD FOR THE CIRCUIT COURT OF BALTIMORE COUNTY. I DISCUSSED WITH THE GOVERNMENT AND THEY AGREED TO STIPULATE THAT THIS IS THE ENTIRE RECORD OR AT LEAST ACCEPT MY PROFFER TO THEM THAT THIS IS THE ENTIRE RECORD.

THE COURT: ALL RIGHT.

MR. JOHNSTON: THE REASON I OFFER THAT, YOUR HONOR, IS BECAUSE WE DON'T BELIEVE THAT IT IS AN ATTEMPTED BURGLARY CONVICTION. THIS WAS SOMETHING THAT WAS DISCOVERED VERY LATE IN THE GAME AND AFTER WE HAD SUBMITTED OUR MEMORANDUM AND ORDER. WE HAD BEEN APPROACHING THE ATTACK OF THE CONVICTION ON THE GROUND OF CONSTITUTIONALITY AND HAD BEEN ASSUMING, BECAUSE THE COMPUTER PRINTOUT SAID IT WAS ATTEMPTED BURGLARY, THAT IN FACT WAS THE BASIS FOR THE CONVICTION. IF THE COURT WOULD LOOK – I DON'T HAVE THESE PAGES NUMBERED, BUT I CAN FIND IT FOR THE COURT. THERE IS A STATEMENT OF CHARGES.

THE COURT: I HAVE GOT IT.

MR. JOHNSTON: THE PAGE RIGHT BEFORE THAT. THOSE ARE THE ONLY CHARGING DOCUMENTS THAT ARE IN THE FILE, AND THE OFFICER THERE WROTE DOWN DID ATTEMPT TO BREAK AND ENTER IN THE DAYTIME DWELLING HOUSE OF THE INDIVIDUAL AND THE REST OF THE [12] CHARGE. HE THEN CHECKED THE BOX COMMON LAW OF MARYLAND, WHICH DOESN'T SHOW UP ON THIS COPY.

THE COURT: I SEE IT ON THIS ONE.

MR. JOHNSTON: IT SHOWS THAT HE CHECKED COMMON LAW OF MARYLAND.

NOW, WE HAVE A NUMBER OF POINTS ABOUT THAT THAT, YOUR HONOR, THAT RAISE US CONCERN. FIRST OF ALL, THERE ARE NO OTHER CHARGING DOCUMENTS IN HERE THAT WE COULD LOCATE, AND THAT WOULD LEAD US TO BELIEVE THAT IT TAKES IT OUT OF THE ENUMERATED CRIMES UNDER THE ARMED CAREER CRIMINAL ACT. IT'S NO LONGER A BURGLARY. IT'S AN ATTEMPTED BREAKING AND ENTERING.

SECONDLY, THERE REMAINS THE ISSUE OF WHETHER OR NOT THIS CAN RELATE OR EQUAL A CRIME OF VIOLENCE AS A CATCHALL PHRASE AS A PART OF THE ARMED CAREER CRIMINAL ACT.

THE COURT: ISN'T THERE AUTHORITY FROM THE FOURTH CIRCUIT THAT SAYS BREAKING AND ENTERING A DWELLING HOUSE IS SUFFICIENT? DOESN'T TAYLOR SAY THAT?

MR. JOHNSTON: NO, I DON'T BELIEVE IT DOES, YOUR HONOR.

THE COURT: IT DOESN'T? EVEN THE STATEMENT OF CHARGES SAYS THAT BREAKING AND ENTERING OF A DWELLING HOUSE. DAYTIME – ISN'T THAT WHAT TAYLOR DEALT WITH?

MR. JOHNSTON: IT WAS A BURGLARY, YOUR HONOR. TAYLOR SPECIFICALLY TALKED ABOUT THE SECOND PRONG OF BURGLARY, THE [13] NEED FOR AN INTENT TO COMMIT A FELONY AS THE REASON FOR THE BREAKING AND THE ENTERING. THERE ARE TWO PRONGS.

THE COURT: ALL RIGHT. GO AHEAD ON.

MR. JOHNSTON: AND TAYLOR EMPHASIZED THAT SECOND PART OF IT AS WHAT YOU CALM [sic] BURGLARY.

I THINK THE CASE LAW IS CLEAR, YOUR HONOR, THAT THIS IS NOT THE MINOR GENERIC BURGLARY UNDER THE TAYLOR DEFINITION.

SO, THEN WE MOVE ON TO THE CONSIDERATION OF WHETHER OR NOT THIS IS IN FACT A CRIME OF VIOLENCE. IF YOU TURN TO THE STATEMENT OF FACTS OR ACTUALLY THE CASE WAS TRIED BASICALLY ON THIS OFFICER'S STATEMENT OF CHARGES. I BELIEVE THE PROSECUTOR BASICALLY JUST READ THE STATEMENT OF CHARGES TO THE JUDGE. THE DEFENSE COUNSEL MOVED FOR A JUDGMENT OF ACQUITTAL, AND THE JUDGE OVERRULED IT; BUT, AS YOU CAN SEE FROM THE STATEMENT OF FACTS, IT DOESN'T ESTABLISH ANY ENTRY WHATSOEVER. THE BEST THIS CASE ESTABLISHES IS BASICALLY VANDALISM, AND THERE WAS NO INTENT FOR THE COURT TO DIVINE OF ANY DESIRE TO ENTER WHATSOEVER.

BASED ON THE STATEMENT OF CHARGES, YOUR HONOR, AND THE FACT THAT THIS WAS MERELY AN ATTEMPTED BREAKING AND ENTERING, NOT EVEN A BREAKING AND ENTERING, AND THAT AT LAST THE VERY IMPORTANT SECOND HALF OF THAT PRONG OF TAYLOR, THE ATTEMPT TO COMMIT A FELONY WHILE INSIDE, I THINK THAT THIS DOESN'T COUNT UNDER THE ARMED CAREER CRIMINAL ACT.

THE COURT: WELL, WHAT DO YOU HAVE TO SAY ABOUT THAT, [14] MR. DIBIAGIO?

MR. DIBIAGIO: WELL, YOUR HONOR, I AM GOING THROUGH THIS NOW. I HAVE ALREADY FOUND THREE PLACES WHERE THE CHARGES ARE CLEARLY DELINEATED OUT AS ATTEMPTED BURGLARY, THE THIRD PAGE IN, THE TRIAL CHARGES, ATTEMPTED BURGLARY.

THE COURT: WHAT A BAG OF WORMS. THESE OPERATION TRIGGERLOCK CASES ARE THE BIGGEST DISASTER THAT HAVE HIT THIS COURT IN TERMS OF FOULED UP RECORDS AND COLLATERAL ISSUES AND MAKING A HASH OUT OF THE SENTENCING PROCEEDINGS. I HAVE NEVER EXPERIENCED ANYTHING LIKE THIS. I THOUGHT MY LETTER HAD PRECLUDED COLLATERAL REVIEW. NOW WE ARE GOING INTO THE STATEMENT OF CHARGES AND STATE COURT RECORDS. LET'S BRING THE COP IN HERE TO TESTIFY ABOUT WHAT HAPPENED. THERE IS NO END TO THIS.

MR. DIBIAGIO: WELL, YOUR HONOR, CLEARLY THIS IS NOT A GIDEON CHALLENGE. THERE ARE PLENTY OF DOCUMENTS.

THE COURT: NO, BUT IT IS A PREDICATE OFFENSE CHALLENGE UNDER TAYLOR. IT OPENS UP THE WHOLE THING, NOT AS TO THE CONSTITUTIONAL ISSUE, BUT AS TO WHETHER IT IS A QUALIFYING CONVICTION.

MR. DIBIAGIO: WELL, WE HAVE A CERTIFIED COPY OF ATTEMPTED BURGLARY.

THE COURT: COPY OF WHAT?

MR. DIBIAGIO: A CERTIFIED COPY OF WHAT HE WAS CONVICTED OF.

[15] THE COURT: THAT DOESN'T MATTER. LOOK AT WHAT TAYLOR SAYS. YOU HAVE TO LOOK AT THE FACTS, DON'T YOU? DOESN'T TAYLOR SAY THAT IT IS NOT WHAT YOU CALL THE OFFENSE, BUT WHAT THE UNDERLYING CONDUCT WAS? MAYBE I AM WRONG. MAYBE I AM WRONG ABOUT THAT. LET'S GET TAYLOR AND LET'S READ IT. IT IS 58 LAW WEEK.

MR. JOHNSTON: YOUR HONOR, WHILE WE ARE WAITING FOR THAT, I ALSO HAVE CASE AUTHORITY FROM MARYLAND THAT SPECIFICALLY DEALS WITH THE CRIME OF BREAKING AND ENTERING AS OPPOSED TO BURGLARY AND THE REASONS WHY THE BREAKING AND ENTERING SECTIONS WERE ENACTED INTO LAW.

THE COURT: I DON'T SEE ANYTHING IN THE STATEMENT OF FACTS, MR. DIBIAGIO, IN THIS CASE THAT SHOWS ANY PROOF OF INTENT TO STEAL, WHICH IS OF COURSE THE INTENT TO COMMIT FELONY IN THE PREMISES, WHICH IS A REQUIRED ELEMENT OF BURGLARY.

MR. JOHNSTON: THESE CASES –

THE COURT: WHAT A DISASTER.

THIS IS A BALTIMORE COUNTY CASE.

MR. DIBIAGIO: WE HAVE THE TRANSCRIPT, YOUR HONOR.

THE COURT: YOU HAVE THE TRANSCRIPT, THAT'S RIGHT. READ THE TRANSCRIPT AND SHOW ME ANYTHING MORE THAN THAT THE OCCUPANT OF THE HOUSE WAS WAKENED BY THE SOUND BREAKING OF GLASS AND GOT DOWNSTAIRS AND HE SAW PEOPLE GETTING INTO A CAR AND LEAVING.

[16] DIDN'T THE FOURTH CIRCUIT DECIDE A CASE OF BREAKING AND ENTERING OF A DWELLING HOUSE?

MR. JOHNSTON: I AM SORRY, YOUR HONOR. I AM NOT AWARE OF IT.

THE COURT: I THOUGHT THAT THEY HAD. I THOUGHT IT WAS ONE THAT CAME UP FROM JUDGE RAMSEY, WHERE THEY SAID THAT THE BREAKING AND ENTERING OF A DWELLING HOUSE WAS A PREDICATE OFFENSE.

HOLD ON A MINUTE. WE WILL RECESS THE PROCEEDINGS.

(AFTER RECESS:)

THE COURT: I FOUND THE ANSWER. THE ANSWER LIES IN TWO CASES. ONE IS THE CASE OF U.S. V. WILSON WHICH IS A PUBLISHED DECISION OF THE FOURTH CIRCUIT. I DON'T HAVE THE CITE. IT IS 90-5203, IN WHICH THE FOURTH CIRCUIT SAID AFTER TAYLOR THAT THE ARMED CAREER CRIMINAL ACT DEFINITION OF VIOLENT CRIMES, WHICH IS THE SAME AS THE GUIDELINES DEFINITION, FORBIDS ANY INQUIRY INTO THE PARTICULAR FACTS

UNDERLYING THE DEFENDANT'S PRIOR CONVICTION FOR BURGLARY. AS LONG AS THE RECORD SHOWS THAT IT WAS BURGLARY, THAT'S IT, AND THE RECORD THE DOCKET INDICATES THAT HE WAS CONVICTED OF BURGLARY, THE TRANSCRIPT SHOWS HE WAS CONVICTED OF BURGLARY, AND THAT IS THE END OF IT, SO LONG AS UNDER STATE LAW THE ELEMENTS OF BURGLARY QUALIFY UNDER TAYLOR, WHICH OF COURSE THEY DO IN MARYLAND.

NOW, THE SECOND THING IS, WHICH IS EVEN MORE TO THE [17] POINT, THAT IN THE CASE CALLED U.S. V. MASON, WHICH WAS JUST DECIDED JANUARY 17TH, APPEALED FROM JUDGE GARBIS, 1992 WEST LAW 6281, THE FOURTH CIRCUIT REVERSED JUDGE GARBIS FOR FAILING TO SENTENCE SOMEBODY AS AN ARMED CAREER CRIMINAL, AND OF THE THREE PREDICATE CONVICTIONS ONE OF THEM WAS A DAYTIME HOUSEBREAKING.

SO, THE BOTTOM LINE IS IT DOESN'T MATTER; AND THE REASON IT DOESN'T MATTER IS, OF COURSE, BECAUSE THE DAYTIME HOUSEBREAKING DOES INVOLVE – IN THE WORDS OF THE ARMED CAREER CRIMINAL ACT, DOES INVOLVE THE POTENTIAL ELEMENTS OF VIOLENCE, BECAUSE, IF SOMEBODY IS IN THE HOUSE, WHICH HAPPENED IN THE BALTIMORE COUNTY CASE, IN FACT –

MR. JOHNSTON: I DON'T THINK THERE WAS ANY –

THE COURT: WELL, I THOUGHT THERE WAS SOMEBODY IN THE HOUSE.

MR. DIBIAGIO: THE RECORD REFLECTS SOMEBODY WAS ASLEEP.

THE COURT: YES. SOMEBODY WAS SLEEPING INSIDE THE HOUSE.

MR. JOHNSTON: I THOUGHT YOU MEANT THE PERPETRATOR WAS IN THE HOUSE.

THE COURT: NO, NO, NO. SOMEBODY WAS SLEEPING INSIDE THE HOUSE; AND, SINCE SOMEBODY WAS SLEEPING INSIDE THE HOUSE, I MEAN, THE VIOLENCE CAN BE THAT PERSON SHOOTING THE PERSON WHO WAY TRYING TO BREAK IN. THAT IS ALL IT TAKES, AND [18] THAT IS ENOUGH TO BE VIOLENT, AND THAT OTHERWISE INVOLVES CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO SOMEONE UNDER 924(E)(2)(B)(2).

SO, THAT IS THE END OF THAT INQUIRY RIGHT THERE. I THINK THE FOURTH CIRCUIT WOULD CLEARLY SAY THAT DAYTIME HOUSEBREAKING, EVEN THOUGH IT IS NOT A BURGLARY, HAS THAT RISK TO IT.

ALL RIGHT. LET'S GO ON TO THE NEXT POINT.

MR. JOHNSTON: YOUR HONOR, JUST BY POINT OF CLARIFICATION IN TERMS OF MY ARGUMENT, WE HAD MET OUR BURDEN TO SHOW THAT HE HAD NOT BEEN CONVICTED OF ANYTHING MORE THAN ATTEMPTED BREAKING AND ENTERING.

THE COURT: WELL, EVEN IF IT'S AN ATTEMPT, THAT IS ENOUGH.

MR. JOHNSTON: I WANTED TO MAKE THE ADDITIONAL ARGUMENT ABOUT ATTEMPT. ATTEMPTED BREAKING AND ENTERING IS EVEN FARTHER REMOVED, AND I THINK TAYLOR DOES AUTHORIZE, LOOKING IN THE FACTS OF A CASE IN CERTAIN INSTANCES; AND I THINK, IF YOU LOOK AT THE FACTS OF THIS CASE, THERE IS NO INFORMATION THAT MY CLIENT WAS EVER IN THE HOUSE TO CREATE ANY SORT OF DANGER IN THE FIRST PLACE.

THE COURT: WELL, HE COULD BE SHOT THROUGH THE WINDOW.

MR. JOHNSTON: AND VANDALISM WOULDN'T APPLY, YOUR HONOR?

[19] THE COURT: NO, BECAUSE HE WAS NOT TRYING TO GET INTO THE HOUSE, AND HE WASN'T CONVICTED OF VANDALISM.

AND MY AUTHORITY FOR SAYING THAT THE FACT THAT IT WAS AN ATTEMPT MAKES IT JUST AS MUCH A PREDICATE OFFENSE AS A COMPLETED OFFENSE IS U.S. V. LANE, 909 F.2D 895 AT 903, SIXTH CIRCUIT, 1990; AND IN MARYLAND THE OFFENSE THERE IS ESSENTIALLY THE SAME AS THE OHIO OFFENSE. THIS DOES QUALIFY IN MY JUDGMENT AS A PREDICATE.

LET'S GO TO THE NEXT ONE, IF YOU HAVE A NEXT ONE.

MR. JOHNSTON: ONE OF THE ARGUMENTS I WANT TO MAKE ABOUT THAT, ATTEMPTED BURGLARY VERSUS ATTEMPTED BREAKING AND ENTERING, IS THAT IT JUST DOESN'T APPEAR TO BE PROPERLY CHARGED, IN ANY EVENT.

THE COURT: WELL, AS THE FOURTH CIRCUIT SAID IN WILSON, A DECISION WITH WHICH I COMPLETELY AGREE BY JUDGE WILKINSON, WHERE HE PREVAILED ON THAT ONE, WHICH HE DIDN'T PREVAIL IN THE JONES CASE, AND WHAT HE SAID IN THE WILSON CASE IS THAT YOU SIMPLY DO NOT RELITIGATE THE UNDERLYING CASE. YOU DON'T GO INTO IT. THAT IS THE END OF IT. NOT WILSON – YES, IN THE U.S. V. WILSON CASE. YOU JUST DON'T GO INTO IT AND YOU DON'T GO INTO WHAT THE STATEMENT OF CHARGES SAID AND WHO STRUCK JOHN ABOUT WHAT HAPPENED. YOU LOOK AT THE RECORD, AND THE RECORD SAYS BURGLARY, AND THAT IS THE END OF IT.

I AM SAYING HERE, EVEN IF IT WAS AN ATTEMPTED [20] DAYTIME HOUSEBREAKING, THAT STILL IS ENOUGH UNDER THE FOURTH CIRCUIT DECISION IN THE MASON CASE THAT I JUST AVERTED TO.

ALL RIGHT. LET'S GO TO THE NEXT ONE, PLEASE.

MR. JOHNSTON: I JUST WANTED TO FINISH BY SAYING, YOUR HONOR, THAT THAT WOULD BE – I WANTED TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON THE BASIS OF THAT,

BASICALLY, THAT COUNSEL GOT HER CLIENT CONVICTED OF SOMETHING THAT DIDN'T EVEN EXIST.

THE COURT: ALL RIGHT. SO, NOW YOU ARE RAISING A STRICKLAND CLAIM AS TO THE STATEMENT OF FACTS BALTIMORE COUNTY CASE AS WELL.

MR. JOHNSTON: THAT IS RIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, AGAIN, THAT COULD BE A HABEAS CORPUS CLAIM, AND I AM NOT GOING TO MAKE ANY FINDINGS ON IT. THE REASON I'M NOT GOING TO MAKE ANY FINDINGS ON IT S [sic] BECAUSE I BELIEVE THE SCOPE OF COLLATERAL REVIEW UNDER 924(E) IS CONFINED TO GIDEON VIOLATION. AS LONG AS THE LAWYER IS ALIVE AT THE TIME OF TRIAL AND IS BREATHING AND IS PHYSICALLY PRESENT, THERE IS NO VIOLATION OF GIDEON; AND, TO MY WAY OF LOOKING AT ALL OF THE CASES, FOR THE REASONS I AMPLY STATED IN MY LETTER OPINION, IF YOU HAVE GOT A LIVING AND BREATHING LAWYER THERE, THAT IS THE END OF IT IN TERMS OF THIS INQUIRY ON A 924(E) COLLATERAL CONVICTION.

IF THE FOURTH CIRCUIT WANTS TO TELL ME AND ALL OF THE OTHER DISTRICT JUDGES IN THE CIRCUIT THAT IN EVERY OPERATION [21] TRIGGERLOCK CASE AND BY EXTENSION IN EVERY ARMED CAREER CRIMINAL CASE AND IN EVERY CAREER OFFENDER CASE WE ARE TO ENTERTAIN A PLENARY HABEAS CORPUS REVIEW ON SENTENCING OF EVERY PREDICATE CONVICTION, I WILL BE

MORE THAN GLAD TO DO IT. IT WILL TAKE, OF COURSE, PRACTICALLY ALL DAY AND ALL NIGHT TO SENTENCE PEOPLE. WE WILL NOT HAVE TIME FOR TRIALS OF OTHER CRIMINAL CASES. WE WILL NOT HAVE TIME TO TRY CIVIL CASES, AND RUNNING THE COURT ON 24 HOUR A DAY BASIS. IF THAT IS WHAT THE FOURTH CIRCUIT WANTS, I AM MORE THAN GLAD TO EXCEED TO THEIR DESIRE, BECAUSE I GET PAID TO BE HERE AND DO WHAT THEY WANT TO TELL ME; AND, IF THAT'S THE DECISION THAT THEY WANT TO REACH, THAT'S FINE, I WILL ABIDE BY IT, BUT RIGHT NOW, AS I READ THE CASE LAW, THAT DECISION WOULD BE PLAINLY WRONG UNDER TUCKER, VERGETTE, GRAVES, AND THE OTHER AUTHORITIES, INCLUDING JUDGE WILKINSON'S DISSENT IN JONES, WHICH I THINK WAS RIGHT.

OKAY. THAT IS MY STATEMENT OF OPINION, AND THAT IS VERY CLEAR, I THINK.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

THE COURT: YES, SIR.

MR. JOHNSTON: OUR NEXT ARGUMENT WITH RESPECT TO ARMED CAREER CRIMINAL STATUS GOES TO THE LEGITIMACY OF THE GUIDELINE 4B1.4 IN THE FIRST PLACE, IN THAT IT LACKS THE AUTHORITY OF ANY CONGRESSIONAL STATUTE DELEGATING TO THE SENTENCING COMMISSION THE AUTHORITY TO PROMULGATE THIS [22] PARTICULAR GUIDELINE.

THE COURT: WELL, THE GENERAL DELEGATION OF AUTHORITY IN SECTION 994 OF TITLE 28 IS ADEQUATE FOR REASONS I INDICATED TO YOU EARLIER IN MY LETTER ON THIS POINT, WHICH WOULD HAVE BEEN DISCUSSED IN PARAGRAPH FOUR OF MY LETTER TO YOU OF JANUARY 30TH.

MAKE SURE THAT IS ON FILE, TOO, RON. DOES THE DOCKET SHOW A COPY OF A LETTER TO COUNSEL DATED JANUARY 30TH?

IN ANY EVENT, I DON'T BUY THE ULTRA VIRES ARGUMENT. THE SENTENCE IS OPEN ENDED, FIFTEEN YEARS TO LIFE. THE SENTENCING REFORM ACT GIVES THE GUIDELINES COMMISSION CARTE BLANCH [sic] TO MAKE ANY GUIDELINES THEY WANT THAT ARE CONSONANT WITH THE PURPOSES OF THE ACT. I THINK THESE ARE CONSONANT WITH THE PURPOSES OF THE ACT UNDER 3553(A)(2).

THE CLERK: THE LETTER OF JANUARY 30TH IS PAPER 40.

THE COURT: OKAY.

GO AHEAD ON, NEXT POINT.

MR. JOHNSTON: YOUR HONOR, THE REST OF MY ARGUMENTS PERTAIN TO THE ACCEPTANCE OF RESPONSIBILITY AND DOWNWARD DEPARTURE.

THE COURT: I WILL HEAR YOU ON THAT NOW, THEN.

MR. JOHNSTON: I WOULD JUST REASSERT OUR ARGUMENT THAT WAS IN THE LETTER TO THE

PROBATION OFFICER ON THE GROUNDS OF ACCEPTANCE OF RESPONSIBILITY.

THE COURT: I AM NOT GOING TO GRANT AN ACCEPTANCE OF [23] RESPONSIBILITY ON THIS RECORD. THE ACCEPTANCE OF RESPONSIBILITY HERE WAS FOR A TRIFLING OFFENSE, INVOLVING A TINY AMOUNT OF NARCOTICS. THE SUBSTANTIAL AND SEVERE, WHICH IS THE HANDGUN VIOLATION THERE HAS NOT BEEN ANY ACCEPTANCE OF RESPONSIBILITY FOR. THEREFORE, NO ADJUSTMENT UNDER 3E1.1.

NEXT POINT.

MR. JOHNSTON: WITH RESPECT TO DOWNWARD DEPARTURES, YOUR HONOR, I WOULD LIKE TO REASSERT AS GROUNDS FOR DOWNWARD DEPARTURES ALL OF THE PROBLEMS THAT WE HAVE ASSERTED WITH RESPECT TO THE OTHER CONVICTIONS, PARTICULARLY THE LAST ONE, THE BREAKING AND ENTERING IN '89. WHAT I AM SAYING, YOUR HONOR, I GUESS, BASICALLY IS THOSE CONVICTIONS ARE NOT – AT LEAST TWO OF THOSE CONVICTIONS WERE NOT SITUATIONS WHERE MY CLIENT DIRECTLY PARTICIPATED IN ANY DANGEROUS ACTIVITY. I THINK THAT THOSE ARE THINGS THAT ARE BEYOND THE NORMAL ARMED CAREER CRIMINAL SITUATION, WHERE THE PERSON WAS A PRINCIPAL OR ENGAGED IN VIOLENT CONDUCT IN ALL THREE. MY CLIENT WAS ONLY AN ARMED CAREER CRIMINAL BY THE TECHNICAL DEFINITION THE COURT HAS GIVEN TODAY AND BY SOME OF THE OTHER CASE LAW THAT EXISTS.

I WANT TO ARGUE, YOUR HONOR, THAT THE COMBINATION OF THESE THREE PARTICULAR CONVICTIONS IN THIS PARTICULAR CASE ARE THE KINDS OF THINGS THAT WERE NOT IN CONTEMPLATION OF THE SENTENCING COMMISSION.

THE COURT: WELL, IN ANY EVENT, IT COULDN'T GO BELOW [24] FIFTEEN YEARS.

MR. JOHNSTON: WELL, I UNDERSTAND THAT, YOUR HONOR. I AM ASKING TO GO TO A DOWNWARD DEPARTURE TO THAT LEVEL OF FIFTEEN BASED ON THE NATURE OF THESE CONVICTIONS AND THE OTHER GROUNDS THAT I RAISED MY LETTER.

THE COURT: DO YOU WANT TO ADDRESS THIS, MR. DIBIAGIO?

MR. DIBIAGIO: YOUR HONOR, THE GOVERNMENT SEES ABSOLUTELY KNOW [sic] GROUNDS WHATSOEVER FOR DEPARTING FROM THE GUIDELINES IN THIS CASE. THIS IS A CAREER OFFENDER, NOT ONLY IN THE STATUTORY TERMS, BUT ALSO IN HIS LIFE. HE STARTED HIS LIFE OUT WITH FIRST DEGREE MURDER, JUVENILE ADJUDICATION, AND HE HAS NEVER STOPPED. HE HAS GONE MULTI-JURISDICTIONAL. HE'S USED A FIREARM. HE IS COLD. HE IS CALCULATED. HE IS WHAT THEY CALL ON THE STREETS A THUG. HE IS VIOLENT, AND THERE IS ABSOLUTELY NO WAY WHATSOEVER THAT THIS INDIVIDUAL DESERVES ANY COMPASSION OR SYMPATHY FROM THIS COURT.

THE COURT: WELL, COMPASSION AND SYMPATHY ARE NOT GROUNDS FOR DEPARTURE, NOR ARE THEY CONSIDERED BY THE SENTENCING COMMISSION, NOR MAY I PROPERLY CONSIDER THEM. YOU STILL HAVEN'T ADDRESSED THE FACT THAT THIS THESE PREDICATE CONVICTIONS, ALTHOUGH THEY TECHNICALLY QUALIFY, SHOW CONDUCT ON THE LOW END OF THE SCALE OF WHAT QUALIFIES AS PREDICATE CONVICTIONS. IS THAT RIGHT OR IS THAT WRONG?

MR. DIBIAGIO: I WOULDN'T AGREE WITH THAT, YOUR [25] HONOR. I WOULDN'T AGREE THAT JUST BECAUSE IN ONE CASE HE DROVE THE CAR AWAY FROM AN ARMED ROBBERY, THAT HE DESERVES ANY LESS CULPABILITY. THE LAW DOESN'T RECOGNIZE ANY LESS CULPABILITY FOR HIS ROLE, AND WE DON'T BELIEVE AT SENTENCING YOU THAT SHOULD CONSIDER ANY LESS CULPABILITY.

THE COURT: WELL, THE SENTENCING COMMISSION, WHEN THE PROMULGATED THIS GUIDELINE THAT UPPED ALL OF THE ARMED CAREER CRIMINALS TO 33 OR 34, TO WHAT EXTENT DID THEY TAKE INTO ACCOUNT THE CONDUCT THAT MIGHT UNDERLIE THE PREDICATE CONVICTIONS? ISN'T 3553 GIVING THE AUTHORITY, IF IT WAS NOT ADEQUATELY CONSIDERED, TO USE IT AS DEPARTURE GROUND?

MR. DIBIAGIO: IT MAY IN SOME INSTANCES.

THE COURT: IN ANY INSTANCE. 3553(B) SAYS, IF I FIND THE COMMISSION DID NOT ADEQUATELY CONSIDER A FACTOR THAT OUGHT TO RESULT IN A LOWER SENTENCE OR A HIGHER SENTENCE, I CAN DEPART. THIS IS THE SHARD OF DISCRETION THAT REMAINS.

MR. DIBIAGIO: THAT'S CORRECT, YOUR HONOR, AND THAT IS REALLY WHERE I WAS ADDRESSING MY FIRST ARGUMENT. YOU HAVE THE DISCRETION UNDER THAT, IF YOU BELIEVE SOME SORT OF UNFAIRNESS BASED ON THE PREDICATE OFFENSES, BASED ON HIS CONDUCT.

THE COURT: UNFAIRNESS DOESN'T HAVE ANYTHING TO DO WITH IT. WHAT IT HAS TO DO WITH IT IS IS IT A FACTOR THAT WAS ADEQUATELY CONSIDERED BY THE COMMISSION. IS IT OR ISN'T IT?

[26] MR. DIBIAGIO: I BELIEVE IN THIS CASE HE IS NOT – THE ARMED CAREER CRIMINAL STATUS AS APPLIED TO THIS DEFENDANT IS FULLY ADEQUATE AND APPROPRIATE.

THE COURT: NO, IT'S NOT A QUESTION OF THE STATUS. THE QUESTION IS – HE IS NOT ARGUING THE STATUS RIGHT NOW. THERE IS NO DEPARTURE FROM THE STATUS. THE QUESTION IS WHETHER THERE OUGHT TO BE A DEPARTURE BELOW THE BASE OFFENSE LEVEL SPECIFIED IN 4B1.4 ON THE GROUND THAT THE COMMISSION DID NOT ADEQUATELY CONSIDER IN MAKING THAT

BASE OFFENSE LEVEL THE NATURE OF THE PREDICATE CONVICTIONS IN TERMS OF THE DEFENDANT'S INVOLVEMENT AND THE KIND OF OFFENSES HE COMMITTED AND WHAT THE ACTUAL OFFENSE CONDUCT WAS.

MR. DIBIAGIO: I THINK THAT IS A CORRECT STATEMENT, THAT THAT PARAGRAPH ALLOWS THE COURT, IF THE PREDICATE OFFENSES ARE NOT ADEQUATELY TAKEN INTO CONSIDERATION – I KNOW I MAY BE SLOW IN UNDERSTANDING THE COURT, AND I APOLOGIZE FOR THAT. WHAT I AM GETTING TO IS THE CORE ISSUE IS, BECAUSE MR. JOHNSTON ARGUED THAT HE HAD SOME SORT OF MINOR ROLE IN THESE PREDICATE OFFENSES, THAT UNDER THAT PARAGRAPH THERE SHOULD BE A DEPARTURE. IS THAT CORRECT, YOUR HONOR?

THE COURT: THAT'S RIGHT. UNDER 3553(B), THE COMMISSION DID NOT ADEQUATELY CONSIDER THE FACTOR AND THAT IT OUGHT TO MITIGATE.

NOW, WHAT THE I AM TRYING TO THE GET OUT OF YOU IS [27] THE GOVERNMENT'S POSITION IN THIS CASE AS TO WHETHER UNDER 3553(B) THE FIRST PRONG IS SATISFIED. THAT IS, DID COMMISSION ADEQUATELY CONSIDER THIS FACTOR AS A DEPARTURE FACTOR, THAT IS, THAT THE ROLE OF THE DEFENDANT IN THE PREDICATE ARMED CAREER CRIMINAL OFFENSES MIGHT HAVE BEEN A MINOR ROLE OR THE OFFENSES MIGHT HAVE BEEN AT THE LOW END OF THE POSSIBLE RANGE OF DANGEROUSNESS.

MR. JOHNSTON: OR THE QUALITY OF HIS REPRESENTATION. I WANT TO THROW THAT IN THERE, TOO.

THE COURT: THROW IT IN.

MR. DIBIAGIO: JUST ONE SECOND, YOUR HONOR.

(PAUSE.)

MR. DIBIAGIO: I THINK THE COMMISSION DID, AND THE REASON WHY THE COMMISSION DID IS REALLY WHAT THE PROBLEM IS THAT WE HAVE HERE, BECAUSE, IF YOU SAY THAT THE COMMISSION DOES NOT ADEQUATELY CONSIDER THE SPECIFIC FACTS OF EACH PREDICATE OFFENSE, THEN IN EVERY CASE THEY COULD ARGUE IT WOULD BE OPENING UP THE PARTICULAR FACTS.

THE COURT: WELL, LOOK AT 4B1.4, WHICH IS BARE BONES. ALL IT SAYS IS BINGO, 33 OR 34.

MR. DIBIAGIO: WE BELIEVE THAT THAT ADEQUATELY TAKES INTO CONSIDERATION, IF THE –

THE COURT: WHERE ARE THE APPLICATION NOTES, BACKGROUND, COMMENTARY, RATIONALE, REASONING, ANYTHING? THEY DIDN'T BOTHER. HOW CAN THAT BE ADEQUATE CONSIDERATION?

[28] MR. DIBIAGIO: WHAT THEY APPARENTLY LOOKED TO IS THEY LOOKED TO IF THE INDIVIDUAL HAS BEEN CONVICTED OF THE PREDICATE OFFENSES.

THE COURT: BUT HOW DID THEY GET TO 34?

MR. DIBIAGIO: YOUR HONOR, I DON'T KNOW. I DON'T KNOW ALL OF THE HISTORY BEHIND WHERE – WHY IS IT 34 AND NOT 35? I DON'T KNOW THAT. I HAVE TO HAVE FAITH IN WHAT THEY DID, AND I NEED TO EXECUTE THAT WITH CONFIDENCE, AND I THINK IN THIS CASE I CAN ARGUE WITH CONFIDENCE THAT THIS IS NOT A MITIGATION TYPE OF CASE. THIS IS NOT A DEPARTURE TYPE OF CASE.

THE COURT: BE CAREFUL WHERE YOU PUT YOUR FAITH, MR. DIBIAGIO.

MR. DIBIAGIO: WELL, YOUR HONOR, I UNDERSTAND THE COURT HAS A LOT OF PROBLEMS WITH THE SENTENCING GUIDELINES. I UNDERSTAND THAT. I HAVE BEEN BEFORE YOU AT SENTENCINGS BEFORE. SOME OF THEM ARE VERY LEGITIMATE, AND I UNDERSTAND THAT, BUT I THINK IN THIS CASE, I THINK LET'S PUT ASIDE THE PROBLEMS WE HAVE WITH THE SENTENCING GUIDELINES, AND IN THIS CASE, WITH THIS DEFENDANT –

THE COURT: BUT, SEE, THE PROBLEM IS THIS WHOLE PROCESS HAS DEGENERATED INTO HYPERTECHNICAL NITPICKS, AND RIGHT NOW WE ARE PICKING A PARTICULAR NIT, AND THE NIT IS WHETHER UNDER 3553(B) THE SENTENCING COMMISSION IN PROMULGATING THE GUIDELINE LEVEL, THE BASE OFFENSE LEVEL OF 33 [29] OR 34 FOR ARMED CAREER CRIMINALS, ADEQUATELY

TOOK INTO ACCOUNT A FACTOR THAT IS ARGUED BY THE DEFENSE HERE, OR A NUMBER OF FACTORS THAT ARE ARGUED BY THE DEFENSE HERE, THAT IS, QUALITY OF REPRESENTATION, NATURE OF THE UNDERLYING CONDUCT, WHAT HAVE YOU, AND THAT IS THE FIRST QUESTION.

THE NEXT QUESTION, WHICH IS THE ONE I THINK YOU ARE TRYING TO ADDRESS, IS OUGHT IT IN THIS CASE RESULT IN A LOWER SENTENCE. SO, WHAT I AM TRYING TO DO IS GET THE ANSWER TO THE FIRST QUESTION FIRST.

MR. DIBIAGIO: THE GOVERNMENT'S ANSWER TO THE FIRST QUESTION IS YES, IT ADEQUATELY DID.

THE COURT: ALL RIGHT. THAT'S ALL I WANT TO HEAR. LET'S GO ON THE NEXT QUESTION, THEN.

THE [sic] DIBIAGIO: ASSUMING THAT IT DID NOT, WITH THIS PARTICULAR CASE, BECAUSE THE GOVERNMENT'S POSITION IS THE ARGUMENT STOPS RIGHT THERE. IF THE SENTENCING COMMISSION ADEQUATELY TOOK IT INTO CONSIDERATION –

THE COURT: I UNDERSTAND THAT.

MR. DIBIAGIO: – THE GOVERNMENT STOPS.

THE COURT: ALL RIGHT.

MR. DIBIAGIO: BUT, FOR THE PURPOSES OF TODAY, FOR THE PURPOSES OF TODAY'S DISCUSSION, LET'S ASSUME THAT IT DID NOT. THIS DEFENDANT? I DON'T THINK THERE IS ANY TYPE OF BASIS

FOR DEPARTURE FOR THIS DEFENDANT. I MEAN, THE ROLE IN THE OFFENSES FOR THIS DEFENDANT? YOUR HONOR, YOU HAVE READ [30] THE RECORD, AND I CAN STAND UP HERE AND TALK ABOUT HIS CAREER ACTIVITIES. HE HAS NEVER CONTRIBUTED TO SOCIETY. HE HAS NEVER SET HIMSELF STRAIGHT. I HAVE READ THE SENTENCING AND ALL OF HIS CONVICTIONS THAT THE DEFENSE HAS PUT UP, AND THEY ALL SAID THE SAME THING, GIVE HIM ONE MORE CHANCE, GIVE HIM A CHANCE HERE, GIVE HIM AN [sic] CHANCE THERE, AND HE REPEATEDLY GOES ON TO CRIMINAL CONDUCT, REPEATEDLY GOES BACK TO THE STREETS, REPEATEDLY VIOLENCE, AND HE HAS THE BENEFIT OF THE JUVENILE SYSTEM, HE HAD BENEFIT OF STATE COUNSELING, HE HAS HAD THE BENEFIT OF PENNSYLVANIA'S CAREER CORRECTION SYSTEM, MARYLAND'S CORRECTIONAL SYSTEM, BALTIMORE COUNTY, BALTIMORE CITY, MULTI-JURISDICTIONAL. HE IS A GANGSTER, HE IS NOT SOMEONE WHO HAS ERRED IN BETWEEN WORKING LEGITIMATELY.

THE COURT: ALL RIGHT. THANK YOU.

DO YOU WANT TO ADDRESS THAT, MR. JOHNSTON?

MR. JOHNSTON: YES, YOUR HONOR, I DO.

THE ISSUE, AS I SEE IT, BEFORE THE COURT IS WHETHER OR NOT THE SENTENCING COMMISSION IN ENACTING 4B1.4 TOOK INTO CONSIDERATION THE KINDS OF THINGS THAT MY CLIENT WAS CONVICTED FOR.

THE COURT: THAT IS ONE OF THE ISSUES. THE OTHER IS WHETHER I OUGHT TO MAKE A DEPARTURE.

MR. JOHNSTON: WELL, I THINK YOU SHOULD, YOUR HONOR. I THINK IT BECAUSE OF THE THINGS THAT WE HAVE RAISED HERE IN THIS CASE. I DON'T AGREE WITH MR. DIBIAGIO'S ASSESSMENT AT [31] ALL. PLUS, I THINK MY CLIENT IS RELATIVELY YOUNG STILL IN HIS LIFE, AND I DON'T SEE WHY FIFTEEN YEARS – I MEAN, WE ARE NOT EVEN TALKING ABOUT WHETHER OR NOT ARMED CAREER CRIMINAL APPLIES. WE ARE TALKING ABOUT FIFTEEN AND UP NOW. WHY ISN'T FIFTEEN YEARS WITHOUT PAROLE ENOUGH TO PUNISH HIM FOR THE KINDS OF THINGS THAT MR. DIBIAGIO IS TRYING TO ARGUE? MY WHOLE ARGUMENT ABOUT THE ARMED CAREER CRIMINAL ACT IS THAT ONE OF THE REASONS WHY I DON'T THING THEY HAD THE AUTHORITY TO DO WHAT THEY DID IS BECAUSE WE ARE TALKING ABOUT FIFTEEN YEARS IN THIS CASE; WE ARE TALKING ABOUT 26, OR 25, OR 24, WHATEVER HIS RANGE MAY ULTIMATELY BE. I THINK, WHEN YOU ARE TALKING ABOUT THOSE KINDS OF NUMBERS, YOU START LOOKING AT THESE KINDS OF THINGS TO SEE IF THE NATURE OF THESE CONVICTIONS – AND ALL THREE OF THEM WE HAD OBJECTIONS TO, I THOUGHT PRETTY FAIR OBJECTIONS TO, YOUR HONOR.

THE COURT: I AM NOT SAYING THEY'RE NOT FAIR. I AM JUST SAYING THEY WON'T BE CONSIDERED.

MR. JOHNSTON: WELL, I AM SAYING THAT THEY OUGHT TO BE CONSIDERED FOR THOSE REASONS.

THE COURT: THEY WON'T BE CONSIDERED ON THE CONSTITUTIONAL GROUNDS.

MR. JOHNSTON: WHAT WE ARE LOOKING AT HERE AGAIN IS JUST ANOTHER EXAMPLE OF HOW EVERYBODY IS A NUMBER. YOU HAVE THREE OF THESE CONVICTIONS, AND, BINGO, YOU ADD UP TO THIS. YOU LOOK AT THE GUIDELINE, AND IT ADDS UP TO THIS.

[32] THE COURT: THIS IS WHAT THE PEOPLE OF THE UNITED STATES WANT, ISN'T IT? THAT'S WHY YOU SEND THESE PEOPLE TO CONGRESS, TO DO THIS.

MR. JOHNSTON: THAT IS THE BIGGEST EMBARRASSMENT TO ME AS A DEMOCRAT, YOUR HONOR, THAT THE PEOPLE THAT I CONSIDER TO BE LIBERAL, THE DEMOCRATS, ARE THE ONES WHO ARE DOING ALL OF THIS STUFF, BUT I DON'T BELIEVE THAT IS WHAT THE PEOPLE WANT. I DON'T BELIEVE THAT WHEN A PERSON IS FACING TRIAL THEY WANT TO BE A NUMBER.

THE COURT: HAVE YOU LISTENED TO THE CAMPAIGN SPEECHES?

MR. JOHNSTON: DO I LISTEN TO THEM, YOUR HONOR?

THE COURT: YES.

MR. JOHNSTON: RARELY.

THE COURT: WELL, YOU WILL HEAR WHAT THEY HAVE TO SAY ABOUT CRIME. THEY ARE NOT HAPPY WITH IT.

MR. JOHNSTON: I DON'T THINK ANY OF US WOULD BE HAPPY WITH THE KIND OF MOB JUSTICE THAT I THINK MOST AMERICANS WOULD THINK THEY WOULD PREFER UNTIL THEY ARE ACTUALLY FACED WITH IT OR ACTUALLY IN THE COURTROOM. I MEAN, I THINK THAT THE GUIDELINES TAKE AWAY A LOT OF AUTHORITY THAT WE GENERALLY VESTED IN JUDGES TO KEEP THAT ASPECT OF THE MOB—REACTION AND RETRIBUTION OUT OF THE SYSTEM. NOW GIVING CONGRESS THE AUTHORITY TO DO THIS TAKES IT ALL AWAY FROM THE JUDGES, AND I ALWAYS THOUGHT THAT ONE OF THE BEST THINGS [33] ABOUT THE SYSTEM WAS THAT YOU CAN MAKE YOUR APPEAL TO A PERSON AND NOT THE SENSIBILITIES OR LACK THEREOF OF THE COMMUNITY.

THE COURT: WELL, OF COURSE, THE GENESIS OF THIS WHOLE SENTENCING REVOLUTION, AS YOU KNOW, CAME FROM THE LIBERAL MOTIVES OF A FEW JUDGES, ONE IN PARTICULAR, WHO JUST PUT ON A BIG SYMPOSIUM AT YALE, WHO THOUGHT THAT IT WAS CRUEL, THAT SOME JUDGES WERE TOO SEVERE AND, THEREFORE, YOU KNOW, WE OUGHT TO STOP THAT: THAT IS WHY WE ARE HERE NOW. THIS IS THE LAW OF UNINTENDED CONSEQUENCES, MR. JOHNSTON.

ALL RIGHT. ANYTHING ELSE YOU WISH TO BRING UP AT THIS TIME?

MR. JOHNSTON: NO, YOUR HONOR, NOT WITH RESPECT TO THE SENTENCE.

THE COURT: ALL RIGHT. HERE ARE MY FINDINGS WITH REGARD TO THE QUESTION THAT HAS BEEN MADE AS TO DEPARTURE.

I HAVE CONSIDERING THE GROUNDS FOR DEPARTURE RAISED BY THE DEFENSE, AND I THINK THAT I DO HAVE THE POWER TO DEPART ON THE GROUNDS AS STATED IN COUNSEL'S EARLIER LETTER. HOWEVER, PURSUANT TO MY LETTER OF JANUARY 30, PARAGRAPH FIVE, I STILL FIND THAT, EITHER ALONE OR IN COMBINATION, THE BACKGROUND FACTORS DO NOT WARRANT A DOWNWARD DEPARTURE BECAUSE MR. CUSTIS HAS SHOWN A CHRONIC INABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW. HE HAS LIVED ON THE OUTSIDE OF THE LAW PRACTICALLY ALL HIS LIFE, AND IT HAS GOT TO [34] COME TO AN END AT SOME POINT.

FOR THE RECORD, I WILL FIND THAT UNDER SECTION 3553(B), THE SENTENCE COMMISSION DID NOT ADEQUATELY CONSIDER THE QUESTION OF THE NATURE OF THE UNDERLYING CRIMINAL CONDUCT OR OF THE PROCEEDINGS THAT RESULTED IN THE ARMED CAREER CRIMINAL STATUS IN SIMPLY FIXING ONE OR TWO OFFENSE LEVELS FOR ARMED CAREER CRIMINALS, EITHER OF WHICH, GIVEN THE CRIMINAL HISTORY CATEGORY THAT IS LIKELY TO BE THERE, IS WELL ABOVE THE FIFTEEN YEAR MANDATORY MINIMUM. THEREFORE, THE SENTENCING COMMISSION DID NOT ADEQUATELY CONSIDER IT.

THE NEXT POINT IS WHETHER IN THIS CASE IT OUGHT TO MITIGATE THE SENTENCE, AND MY ANSWER TO THAT IS NO, FOR THE SAME REASONS THAT I HAVE GIVEN BEFORE, AND THAT IS THAT THIS INDIVIDUAL HAS SHOWN AN INABILITY TO LIVE WITH IN [sic] THE SYSTEM AND IN THE REQUIREMENTS OF THE LAW, EVEN THOUGH HE HAS BEEN GIVEN NUMEROUS OPPORTUNITIES TO STRAIGHTEN HIMSELF OUT. HE HAS ALWAYS WOUND UP IN COURT AGAIN AND AGAIN AND AGAIN AND AGAIN, AND IT WILL KEEP ON; AND I THINK THAT IN THOSE CIRCUMSTANCES NO DEPARTURE IS GOING TO BE GIVEN.

ALL RIGHT. THE COURT FINDS THE DEFENDANT IS AN ARMED CAREER CRIMINAL UNDER SECTION 824(E). THE QUESTION OF THE OFFENSE LEVEL THERE IS WHETHER IT IS AT 33 OR 34.

DO YOU WISH TO BE HEARD ON THAT?

MR. JOHNSTON: WELL, YOUR HONOR, IF I CAN JUST GET THE GUIDELINE.

[35] THE COURT: 4B1.43A OR B.

MR. JOHNSTON: WELL, I WOULD LIKE 33 YOUR HONOR.

THE COURT: I KNOW YOU WOULD, BUT I THINK IT QUALIFIES BY A PREPONDERANCE OF THE EVIDENCE UNDER 3A AS A 34 BECAUSE AT THE SAME TIME HE HAD DOPE ON HIM, AND THE DEFINITIONS IN 4B1.22 SAYS CONTROLLED SUBSTANCE, WHICH MEANS AN OFFENSE, PROHIBITING MANUFACTURE, IMPORT, EXPORT, OR DISTRIBUTION, OR

POSSESSION WITH INTENT TO MANUFACTURE, IMPORT, EXPORT, OR DISTRIBUTE.

MR. JOHNSTON: HE WAS NOT CONVICTED OF THOSE OFFENSES, YOUR HONOR.

THE COURT: NO, HE WAS NOT CONVICTED OF THEM, BUT THE QUESTION IS WHETHER HE POSSESSED THEM IN CONNECTION WITH, AND THERE DOESN'T HAVE TO BE A CONVICTION OF THOSE THINGS TO BE POSSESSING IN CONNECTION WITH. IT'S JUST BY A PREPONDERANCE, IT SEEMS TO ME. ISN'T THAT RIGHT?

MR. JOHNSTON: NO, I DON'T THINK IT IS RIGHT IF HE IS ACQUITTED OF THOSE CHARGES.

THE COURT: WHAT WAS HE CONVICTED OF HERE?

MR. JOHNSTON: JUST SIMPLE POSSESSION AND BEING A FELON IN POSSESSION.

THE COURT: THAT'S RIGHT. HE WAS JUST CONVICTED OF SIMPLE POSSESSION, WASN'T HE?

DOES THE GOVERNMENT HAVE ANY OBJECTION TO OFFENSE LEVEL 33, THEN, BECAUSE I THINK HE IS RIGHT ABOUT THAT. THERE [36] IS NO EVIDENCE OF DISTRIBUTION HERE.

MR. DIBIAGIO: THAT WOULD BE CORRECT.

THE COURT: ALL RIGHT. OFFENSE LEVEL 33, THEN.

PLEASE, MISS JONES, MAKE SURE THE P.S.I. SO INDICATES, WILL YOU?

MS. JONES: YES, SIR.

THE COURT: ALL RIGHT.

SO, IT'S OFFENSE LEVEL 33 HERE.

CRIMINAL HISTORY CATEGORY IS SIX.

OTHER THAN THE POINTS OF INVALIDITY YOU HAVE RAISED, DO YOU HAVE ANY POINT ON THE CRIMINAL HISTORY CATEGORY COMPUTATION?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. CRIMINAL HISTORY CATEGORY SIX, WHICH GIVES A GUIDELINE OF 234 TO 293 MONTHS. ALL RIGHT.

IS THERE ANY GENERAL ALLOCUTION YOU WOULD DESIRE BEFORE I SET THE SENTENCE, MR. JOHNSTON?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: MR. CUSTIS, BEFORE I IMPOSE THE SENTENCE IN THIS CASE, THIS IS YOUR OPPORTUNITY TO BRING TO MY ATTENTION ANYTHING AT ALL YOU WISH ME TO CONSIDER IN EXTENUATION OR MITIGATION OF THE OFFENSE OR PENALTY TO BE IMPOSED FOR IT OR ANY OTHER MATTER THAT YOU WISH TO TAKE INTO ACCOUNT. IF THERE IS ANYTHING YOU WISH TO SAY, THIS IS YOUR CHANCE TO DO IT.

[37] THE DEFENDANT: YOUR HONOR, OKAY. NOW, I UNDERSTAND YOUR POINT AND ALSO THE PROSECUTOR'S POINT AS FAR AS THE FACT THAT I HAVE BEN [sic] GIVEN OTHER

CHANCES. OKAY? I HAVE DONE MY BEST WHILE I WAS OUT THERE. IT IS STILL A LOT OF QUESTION THERE, A WHOLE LOT OF QUESTION AS FAR AS THE HONESTY OF THE ARRESTING OFFICERS WHO ARRESTED AND HAD ME CONVICTED, HELPED CON CONVICT ME OF THIS INSTANT OFFENSE HERE.

THE COURT: THAT'S ALL RIGHT. HE CAN SAY ANYTHING HE WANTS TO SAY.

GO AHEAD.

THE DEFENDANT: NOW, JUST FOR THE SAKE OF ARGUMENT, LET'S JUST SAY, OKAY, THESE COPS ARE CRIMINAL. THEY ARE CROOKED. YOU MEAN THAT I SHOULD GET 25 OR 30 YEARS IN PRISON BECAUSE THIS COP WAS CRIMINAL, ARRESTED ME, LIED ON ME, GOT ME CONVICTED? YOU UNDERSTAND? IF YOU WAS TO READ EVEN HIS GRAND JURY TESTIMONY, HE TOLD TWO OR THREE OUT AND OUT BLATANT LIES RIGHT THERE THAT MANIFESTED AT MY TRIAL. OKAY? IF IT WEREN'T FOR HIM PERJURING HIMSELF FROM THE BEGINNING, I WOULDN'T BE STANDING HERE IN THIS FEDERAL COURTROOM.

NOW, WITH ALL OF THIS TO CONSIDER, ISN'T IT A POSSIBILITY THAT THERE IS A LOT MORE TO THIS CASE THAN MEETS THE EYE?

YES, I HAVE DONE TIME. I GOT OUT, AND I TRIED MY BEST. OKAY. I HAD A DRUG PROBLEM. I ADMIT TO THAT FROM THE BEGINNING. BUT HAVING A DRUG PROBLEM AND RUNNING AROUND WITH [38] A GUN IN MY POCKET IS TWO DIFFERENT

THINGS. I NEVER RAN AROUND WITH NO GUN. I JUST WENT TO BUY SOME DRUGS. OKAY? SO, NOW THERE ISN'T A POSSIBILITY – BECAUSE OF THE FACT THAT I HAD PREVIOUSLY BEEN ARRESTED AND SERVED TIME, THERE ISN'T A POSSIBILITY THAT I COULDN'T HAVE REFORMED MYSELF, AT LEAST TO THE LEVEL WHERE I DIDN'T TRY TO COMMIT NO CRIMES WHICH WOULD HURT NOBODY ELSE? BECAUSE I REALLY DIDN'T THINK GOING TO BUY ANY DRUGS FOR MY PERSONAL USE WOULD IN FACT HURT ANYBODY ELSE, AND I CERTAINLY DIDN'T THINK THAT IT WOULD HURT ME LIKE IT IS HURTING ME NOW, AND THAT IS THE BOTTOM LINE TO THIS WHOLE THING.

THAT IS ALL I HAVE TO SAY, YOUR HONOR. I MEAN, THERE IS NOTHING ELSE FOR ME TO SAY.

LIKE I SAID, I HAVE BEEN IN THE WRONG BEFORE. EVERYTHING I HAVE DONE IN THE PAST, IF I ACTUALLY DID IT, I PLED GUILTY TO IT. I TOOK MY PUNISHMENT FOR IT. IF I HAD DONE THIS, I COULD HAVE PLED GUILTY FROM THE BEGINNING WHEN THE PROSECUTOR OFFERED TO DROP THE DRUG CHARGES IF I PLEAD GUILTY TO THE GUN. WHAT WOULD HAVE BEEN THE DIFFERENCE? I WOULD HAVE BEEN IN THE SAME SITUATION I AM IN NOW.

THE COURT: THAT'S RIGHT.

THE DEFENDANT: BUT I DIDN'T DO IT.

I KNEW WHAT WAS GOING TO HAPPEN. IF I GOT ONE COP LYING ON ME, SAYING HE SAW ME COME FROM WHERE THE GUN WAS FOUND, THEN I GOT

ANOTHER COP – AT FIRST I FIGURED THAT [39] MAYBE THE MAN HAD BEEN MISTAKEN, BUT NOW, ONCE I FIND OUT A LOT OF OTHER THINGS, THOSE OTHER THINGS MANIFEST, I AM NOT TOO SURE ABOUT WHETHER IT WAS MISTAKE OR WHETHER IT WAS A BLATANT LIE, BECAUSE EVEN IN STATE COURT, FROM WHAT OFFICER WADE HAS SAID FROM THE BEGINNING, HE COULDN'T HAVE CONVICTED ME FOR A GUN THAT NOBODY EVER SAW UNTIL HE SAW IT IN HIS WAISTBAND.

LIKE I SAY, YOUR HONOR, THAT IS IT. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT SIR.

THE CHARGE OF WHICH HE WAS CONVICTED – RON, WE ARE GOING TO HAVE TO SPECIFY WHAT THE CHARGE WAS, THE LESSER INCLUDED OFFENSE, IN COUNT ONE. IT WASN'T INTENT TO DISTRIBUTE. THE LESSER INCLUDED OFFENSE WAS 844(A). ISN'T THAT RIGHT? I WILL PUT IT DOWN ON HERE.

WHAT IS THE MAXIMUM SENTENCE UNDER 844(A)?

MISS JONES, DID YOU LOOK INTO THAT?

MS. JONES.YES, YOUR HONOR.

THE COURT: WHAT IS THE MAXIMUM SENTENCE UNDER 844(A)? I COULDN'T FIND IT – THERE IS NO (A)(1). IT IS JUST (A). I COULDN'T FIND IT IN YOUR REPORT.

WHAT IS IT, MISS JONES?

MR. DIBIAGIO: YOUR HONOR, I BELIEVE IT IS ONE YEAR.

THE COURT: IT IS A YEAR, ISN'T IT? I THINK THAT IS RIGHT, A YEAR.

[40] ALL RIGHT.

THE DEFENDANT, HAVING BEEN FOUND GUILTY ON THE LESSER INCLUDED OFFENSE AS TO COUNT ONE AND ALSO ON COUNT THREE, IS SENTENCED AS PROVIDED IN PAGES TWO THROUGH THREE OF THIS JUDGMENT PURSUANT TO THE SENTENCING REFORM ACT OF 1984.

THE DEFENDANT HAS BEEN FOUND NOT GUILTY ON COUNT TWO AND DISCHARGED AS TO AS TO THAT COUNT.

IT IS ORDERED THAT THE DEFENDANT SHALL PAY A SPECIAL ASSESSMENT OF $100 FOR COUNTS ONE AND THREE.

ACTUALLY, THAT IS NOT A FELONY, IT IS, THEN? BECAUSE IF IT IS ONLY A YEAR, THAT IS A MISDEMEANOR. WHAT IS THE ASSESSMENT ON A MISDEMEANOR? IT IS $25 ISN'T IT?

MR. SIMS: YES.

THE COURT: ALL RIGHT. AN ASSESSMENT OF $75 FOR COUNTS ONE AND THREE, WHICH SHALL BE DUE TO BE PAID DURING HIS PERIOD OF IMPRISONMENT.

YOUR SOCIAL SECURITY NUMBER IS 216-78-9057. IS THAT RIGHT?

THE DEFENDANT: YES.

THE COURT: BORN ON THE 14TH OF FEBRUARY OF '65. IS THAT RIGHT?

THE DEFENDANT: YES.

THE COURT: WHAT IS YOUR PERMANENT ADDRESS?

THE DEFENDANT: 4006 MAIN AVENUE.

THE COURT: AND WHAT ZONE IS THAT IN?

[41] THE DEFENDANT: 07.

THE COURT: BASED ON THE FINDINGS OF THE COURT IN THIS CASE, THE DEFENDANT WILL BE SENTENCED AT OFFENSE LEVEL 33, CRIMINAL HISTORY CATEGORY NUMBER SIX, AND THE GUIDELINE RANGE THERE IS 235 TO 293.

FRANKLY, I HAVE GOT TO STATE THE REASONS FOR A SENTENCE AT A PARTICULAR POINT IN THE GUIDELINE RANGE, AND I SEE NO REASON AT ALL TO GO ABOVE 235 MONTHS IN THIS CASE. THAT IS ALMOST TWENTY YEARS IMPRISONMENT, AND IT SEEMS TO ME IS CERTAINLY ADEQUATE TO FULFILL ALL OF THE GOALS OF PUNISHMENT AS SET FORTH BY THE CONGRESS IN 3553(A) IN THIS CASE. I THINK ANY HIGHER SENTENCE WOULD BE JUST OUT OF ANY BOUNDS OR PROPORTION.

ALL RIGHT. THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE UNITED STATES BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 235 MONTHS, AS FOLLOWS: 235 MONTHS

AS TO COUNT THREE AND TWELVE MONTHS AS TO COUNT ONE, LESSER INCLUDED OFFENSE, CONCURRENTLY.

THE DEFENDANT IS REMANDED TO THE CUSTODY OF THE UNITED STATES MARSHAL FOR SERVICE OF SENTENCE.

IS THERE A MINIMUM SUPERVISED RELEASE, MISS JONES, IN THIS CASE OR A MAXIMUM OR SOMETHING? BETWEEN THREE AND FIVE YEARS. IS THAT RIGHT?

MR. JOHNSTON: THREE TO FIVE YEARS, YOUR HONOR.

THE COURT: UPON RELEASE FROM IMPRISONMENT, THE [42] DEFENDANT SHALL BE ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS.

WHILE ON SUPERVISED RELEASE, HE WILL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME, WILL NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE, WILL COMPLY WITH THE STANDARD CONDITIONS OF RELEASE SET FORTH ON PAGE THREE OF THE JUDGMENT, AND THE FOLLOWING CONDITION, THAT HE WILL NOT POSSESS A FIREARM OR DESTRUCTIVE DEVICE DURING THE PERIOD OF SUPERVISED RELEASE.

ALL RIGHT. THE COURT DOES NOT IMPOSE ANY FINE OR RESTITUTION IN THIS CASE BECAUSE OF THE DEFENDANT'S OBVIOUS ABILITY TO PAY ANY SUCH.

NOW, BEFORE WE MOVE ON TO THE OTHER MATTERS, MR. CUSTIS, DO YOU UNDERSTAND THAT YOU HAVE A RIGHT TO APPEAL THE CONVICTION AND THE IMPOSED IN THIS CASE?

THE DEFENDANT: YES.

THE COURT: AS TO ALL COUNTS. IF YOU WISH AN APPEAL TO BE FILED, SIMPLY ASK MR. JOHNSON [sic] TO DO SO, AND HE WILL DO SO AT YOUR REQUEST. IF FOR ANY REASON HE SHOULD FAIL OR REFUSE TO DO SO, THEN YOU CAN SIMPLY WRITE TO THE CLERK OF THE COURT WITHIN TEN DAYS, STATING YOUR WISH TO APPEAL FROM THE JUDGMENT AND/OR SENTENCE, AS YOU DESIRE. MAKE SURE IT IS IN WRITING. THERE IS NO FEE BECAUSE YOU HAVE BEEN FOUND TO BE INDIGENT.

DO YOU UNDERSTAND THAT?

[43] THE DEFENDANT: YES, SIR.

THE COURT: COUNSEL, ARE THER [sic] EANY [sic] OBJECTIONS AS TO THE FORM OF THE SENTENCE AS IMPOSED.

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. NOW LET'S MOVE ON TO THE MOTION FOR NEW TRIAL. DO YOU WISH TO MAKE A MOTION FOR NEW TRIAL, MR. JOHNSTON?

MR. JOHNSTON: YES, YOUR HONOR, PURSUANT TO RULE 33.

THE COURT: YES, SIR. DO YOU HAVE AN OBJECTION?

MR. DIGIAGIO: YOUR HONOR, BEFORE WE GO ON, MAY I INTRODUCE AS GOVERNMENT'S EXHIBIT NUMBER 1 IN CONNECTION WITH THE SENTENCING PHASE THE CERTIFIED COPY OF THE CONVICTION AS REFERRED IN YOUR JANUARY 30TH, 1992 LETTER?

THE COURT: YES. YOU DON'T HAVE ANY OBJECTION TO THAT, DO YOU, MR. JOHNSTON?

MR. JOHNSTON: YES, I OBJECT. IT IS IRRELEVANT.

THE COURT: OVERRULED. PUT IT IN. IT MIGHT HAVE SOMETHING TO DO WITH WHAT HAPPENS ON APPEAL.

ALL RIGHT. NOW, LET'S MOVE ON, THEN TO THE MOTION FOR NEW TRIAL. I WILL HEAR YOU ON THE MOTION FOR NEW TRIAL.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

YOUR HONOR, AS THE COURT KNOWS, IT BECAME KNOWN TO THE DEFENDANT AFTER MY CLIENT'S CONVICTION THAT THERE HAD BEEN AN INVESTIGATION IN THE BALTIMORE CITY POLICE DEPARTMENT, PARTICULARLY IN THE NORTHWESTERN DISTRICT, REGARDING NOT LESS [44] THAN FIVE OFFICERS WHO WORK IN THE NORTHWEST DISTRICT AND INVOLVING NOT LESS THAN THREE SEPARATE INCIDENTS OF PERJURY COMMITTED BY THOSE FIVE OFFICERS.

THE INVESTIGATIONS BEGAN WITH THE JULY 17TH RAID ON WHAT TURNED OUT TO BE A RELATIVE OF THE MAYOR'S. THE MAYOR, AFTER MAKING SOME REQUESTS FOR INVESTIGATION, FOUND AND THE INVESTIGATION BORE FRUIT THAT NICHOLAS CONSTANTINE HAD COMMITTED PERJURY IN A SEARCH WARRANT AFFIDAVIT, THAT HE HAD SWORN THAT SOMETHING HAD BEEN DONE, WHEN IN FACT HE KNEW THAT IT HAD NOT BEEN DONE

THIS WAS BACK IN NOVEMBER, YOUR HONOR, WHEN OFFICER CONSTANTINE WAS INDICTED, WHICH MEANT THERE MUST HAVE BEEN AN INVESTIGATION PRIOR TO NOVEMBER. HE WAS INDICTED, I BELIEVE, NOVEMBER 7TH OF 1991. THE TRIAL IN THIS CASE WAS NOVEMBER 18TH OF 1991.

THE OFFICERS THAT HAVE BEEN INDICTED, THERE ARE FIVE OF THEM, HAVE BEEN INDICTED FOR ACTS THAT OCCURRED WELL IN ADVANCE OF THE DATE OF MY CLIENT'S TRIAL. IN FACT, I BELIEVE OFFICER WADE WAS IN FEBRUARY OF 1991, THE ACT FOR WHICH HE HAS BEEN INDICTED. THAT THERE WAS AN INVESTIGATION ONGOING IN THE DEPARTMENT FOR A LONG TIME PRIOR TO MY CLIENT'S TRIAL IS OBVIOUS.

NOW, I HAVE NOT BEEN PRIVY TO ANY OF THE INFORMATION THAT THE GOVERNMENT HAS BEEN ALLOWED TO INSPECT, BUT, REGARDLESS OF THIS –

[45] THE COURT: I ORDERED THEM TO INSPECT IT, AND I READ THE AFFIDAVIT, AND THE AFFIDAVIT IS ON FILE FOR THE COURT OF APPEALS TO LOOK AT, TOGETHER WITH MATERIAL FROM

THE FILES THAT INDICATES – THE ONLY REASON I AM KEEPING IT HE SEALED IS BECAUSE OF COMITY THAT COULD AFFECT AN ONGOING STATE PROSECUTION. SO, I THINK IT OUGHT TO REMAIN SEALED AT THIS POINT, BUT I HAVE READ IT AND LOOKED AT IT, AND I AM SATISFIED THAT AT LEAST THE MATERIAL THAT HE PUT ON THERE SUPPORTS THAT THERE WAS NO BRADY SITUATION BECAUSE, AS TO THE INVOLVEMENT OF THESE PARTICULAR OFFICERS, THIS DID NOT COME TO LIGHT UNTIL JANUARY OF '92, AS I RECOLLECT.

IS THAT CORRECT, MR. SIMS?

MR. SIMS: THAT IS CORRECT, YOUR HONOR.

MR. JOHNSTON: REGARDLESS OF A POSSIBLE BRADY VIOLATION, YOUR HONOR, WITH RESPECT TO THE NEWLY DISCOVERED EVIDENCE –

THE COURT: WELL, OBVIOUSLY, IT DEEPLY CONCERNS ME, GIVEN THAT EVERYTHING I HEARD IN THIS CASE AND THE FACT THAT IT TURNS ENTIRELY ON CREDIBILITY OF THE ARRESTING OFFICERS, BOTH AS TO THE SUPPRESSION SITUATION AND AS TO THE TRIAL, AND I WANT TO HEAR FROM THE GOVERNMENT WITH REGARD TO THIS, BECAUSE, AS I POINTED OUT IN THAT CASE THAT I CITED TO YOU OF JUDGE BUTLER'S IN 429 F. SUPP., EVEN THOUGH IMPEACHING EVIDENCE IS USUALLY NOT ENOUGH FOR A NEW TRIAL WHERE IT UNDERMINES CONFIDENCE IN THE OUTCOME, IT CERTAINLY CAN BE, AND [46] I WANT TO HEAR FROM THE GOVERNMENT HOW YOU CAN DEFEND

THE RESULT OF THIS TRIAL WITH TWO POLICE OFFICERS WHO ARE UNDER THE INDICTMENT FOR PERJURY IN THE COURSE OF THEIR OFFICIAL DUTIES.

MR. SIMS: WELL, YOUR HONOR, THERE ARE TWO ISSUES THAT WE RAISED IN OUR MOTION, ONE IN TERMS OF THE NEW TRIAL MOTION BEING MADE AT THIS POINT. IT WOULD PROBABLY BE –

THE COURT: WELL, IF HE DOESN'T MAKE IT AT THIS POINT, HE COULD WAIVE IT ANYWAY, BECAUSE YOU HAVE GOT TO ACT SPEEDILY WHEN YOU DISCOVER NEW EVIDENCE, AND IT IS NOT UNTIMELY BECAUSE IT IS NOT SOMETHING HE FOUND OUT WITHIN SEVEN DAYS AFTER THE VERDICT. YOU KNOW, YOU HAVE GOT YOUR TWO YEARS TO ACT, OBVIOUSLY. HE HAS MADE THE MOTION. I THINK THE MOTION IS TIMELY. THE QUESTION OF WHETHER ANY RELIEF OUGHT TO BE GRANTED AT THIS POINT IS ANOTHER MATTER.

MR. SIMS. I THINK THAT IS THE POINT I AM TRYING TO REACH AT THIS STAGE, YOUR HONOR, THAT CERTAINLY THE MOTION IS MADE. WE UNDERSTAND THE COURT'S CONCERN, AND OBVIOUSLY WE WERE QUITE CONCERNED.

THE COURT: HOW COME YOU ALL DIDN'T BRING THIS TO MY ATTENTION EITHER? I SHOULD THINK THAT THE GOVERNMENT WOULD HAVE AN INTEREST IN SHOWING THE INTEGRITY OF ITS PROSECUTION TO BRING TO THE ATTENTION OF THE COURT THE FACT THAT TWO WITNESSES ON WHOSE TESTIMONY DEPENDED A CONVICTION HAVE BEEN INDICTED FOR PERJURY.

[47] MR. SIMS. YOUR HONOR, WE ACTUALLY FOUND THIS OUT BECAUSE WE ALSO READ IT IN THE NEWSPAPER, AS I RECALL.

THE COURT: AND THE CITY POLICE NEVER TOLD YOU ABOUT IT OR THE ATF?

MR. SIMS. NO. AS I UNDERSTAND THE SITUATION, THE INVESTIGATION BEING CONDUCTED BY THE STATE'S ATTORNEY'S OFFICE WAS NEVER EVEN MADE KNOWN –

THE COURT: WHEN DID THE ATF FIND OUT ABOUT THIS?

MR. SIMS. I THINK WE ALL READ IT IN THE PAPER, YOUR HONOR.

THE COURT: WELL, IT IS QUITE SAD WHEN A FEDERAL PROSECUTION IS IS CALLED INTO QUESTION BY AN INDICTMENT OF PERJURY FOR OFFICERS. I MEAN, ONE WOULD HOPE THIS WOULDN'T HAPPEN WITH FEDERAL OFFICERS; BUT, WHEN YOU BUY ONE OF THESE ADOPTED PROSECUTIONS, YOU ARE BUYING A LOAD OF MISCHIEF, AND THIS IS ANOTHER ILLUSTRATION OF WHAT HAPPENS IN THESE THINGS. I MEAN, IT'S VERY, VERY SAD. IT MAKES THE U.S. GOVERNMENT LOOK VERY BAD.

MR. SIMS. I UNDERSTAND THE COURT'S CONCERN, AND OBVIOUSLY WE WERE QUITE CONCERNED ABOUT THIS, AS WELL.

THERE ARE NUMEROUS FEDERAL PROSECUTIONS IN WHICH STATE OFFICERS ARE CALLED AS WITNESSES AND EVEN AS IMPORTANT WITNESSES. IT IS QUITE UNUSUAL FOR ANY OFFICER TO BE

INDICTED FOR PERJURY UNDER THESE CIRCUMSTANCES, AND I DON'T THINK IT CALLS INTO QUESTION WHETHER THESE TYPES OF PROSECUTIONS ARE [48] APPROPRIATE OR PROSECUTIONS WHERE STATE OFFICERS ARE NECESSARY ARE APPROPRIATE.

THE COURT: WELL, MAYBE IT DOESN'T GO THAT BROADLY, BUT IT STILL IS EXTREMELY DISTURBING.

MR. SIMS. IT IS DISTURBING, YOUR HONOR, BUT PART OF OUR BASIS FOR SUGGESTING THAT THE NEW TRIAL MOTION NOT BE GRANTED AT THIS POINT IS THAT, ONE, BASED ON THE NATURE OF THE ALLEGATIONS AGAINST THESE OFFICERS AND ALSO THE FACT THAT THEIR CASE HAS ONLY RECENTLY BEEN INDICTED.

THE COURT: WHAT IS THE SCHEDULE OF PROCEEDINGS IN THIS CASE?

MR. SIMS. MY UNDERSTANDING, YOU HONOR, IS THAT THE ONLY SCHEDULED PROCEEDING AT THIS POINT IS THE ARRAIGNMENT OF THE FIVE OFFICERS THAT WERE INDICTED.

THE COURT: WELL, I CAN'T LET THIS THING HANG THIS THING HANG DEFINITELY.

MR. SIMS. I UNDERSTAND WHAT THE COURT'S CONCERN IS. OUR CONCERN IS THAT THIS IS THE INDICTMENT AGAINST TWO OFFICERS OR FIVE OFFICERS IN CIRCUMSTANCES THAT ARE SUCH THAT THIS MAY WELL NOT EITHER LEGALLY AMOUNT TO PERJURY OR AS A FACTUAL MATTER

NOT BE PERJURY. TO PUT THE OFFICERS AND THE GOVERNMENT IN A POSITION WHERE A NEW TRIAL WOULD BE GRANTED, THESE ARE TWO OBVIOUSLY IMPORTANT WITNESSES. THEY HAVE ONLY BEEN INDICTED, AND THE CHANCES ARE THAT CROSS-EXAMINATION ON THE INDICTMENT ITSELF IS SUBJECT TO BE BROUGHT IN. I THINK IT [49] IS UNFAIR, GIVEN THE CIRCUMSTANCES.

THE COURT: WELL, I THINK THEY WOULD HAVE TO ASSERT THEIR FIFTH AMENDMENT PRIVILEGE. THEN WHAT WE WOULD HAPPEN?

MR. SIMS. I HAVEN'T SPOKEN TO THE OFFICERS. I DON'T KNOW WHAT WOULD HAPPEN ON RETRIAL. I CAN'T REPRESENT THAT. CERTAINLY, THAT WOULD BE A TREMENDOUS CAUSE FOR CONCERN, AND THE PROCEDURAL CIRCUMSTANCES OF THIS CASE –

THE COURT: IT WOULD ALMOST GUARANTEE YOU WOULDN'T GET A CONVICTION. DO YOU THINK A JURY IS GOING TO CONVICT SOMEBODY WHEN THE OFFICERS ON CROSS-EXAMINATION INVOKE THE FIFTH AMENDMENT? THERE'S NO WAY. THERE IS NO WAY.

MR. SIMS. I AM NOT CERTAIN THAT THAT IS WHAT IS GOING TO HAPPEN. I WORK FOR THE FEDERAL GOVERNMENT. I DON'T REPRESENT THESE TWO OFFICERS. I DON'T KNOW WHETHER THEY WOULD ASSERT THE FIFTH AMENDMENT THE OR AGREE TO TESTIFY IN THIS CASE . THAT IS DOWN THE ROAD.

WHAT I AM SUGGESTING IS THIS IS AN INDICTMENT ON PARTICULAR CIRCUMSTANCES OF THE INVESTIGATION THAT ARE COMPLETELY DIVORCED FROM THIS CASE.

THE COURT: THANK YOU.

MR. JOHNSTON, DO YOU WANT TO ADDRESS THE TIME ISSUE HERE?

MR. JOHNSTON: I CERTAINLY DON'T WANT TO HAVE THE COURT RESERVE RULING ON THE MOTION FOR THE NEW TRIAL ON ITS MERITS. SCHEDULING THE TRIAL IS A WHOLE NOTHER MATTER, BUT [50] THE IMPEACHMENT VALUE OF THESE ACTS THAT THESE OFFICERS ARE ALLEGED –

THE COURT: SUPPOSE THEY ARE ACQUITTED? THERE IS NO IMPEACHMENT VALUE.

MR. JOHNSTON: YES, THERE IS, YOUR HONOR.

THE COURT: WHY. HOW CAN YOU RAISE THAT?

MR. JOHNSTON: BECAUSE THEY HAVE BEEN INDICTED. THERE ARE PEOPLE OUT THERE THAT HAVE THE OPINION, EITHER LAY PERSONS OR PEOPLE IN THE POLICE DEPARTMENT HAVE AN OPINION ABOUT THE CHARACTER OR TRUTHFULNESS OR VERACITY OF THESE WITNESSES.

THE COURT: WHAT ARE YOU GOING TO DO, CALL THE GRAND JURORS AS WITNESSES?

MR. JOHNSTON: I AM NOT SUGGESTING TO CALL THE GRAND JURORS.

THE COURT: HOW ARE YOU GOING TO ESTABLISH THIS BY OPINION EVIDENCE?

MR. JOHNSTON: WELL, YOUR HONOR, IF THE SUBPOENAS HAD NOT BEEN QUASHED AND WE COULD INVESTIGATE, REGARDLESS OF WHETHER THE SUBPOENAS HAD BEEN QUASHED, THERE ARE PEOPLE OUT THERE THAT WE ARE ALLOWED TO FOLLOW UP AND INVESTIGATE THESE ALLEGATIONS. WE WILL FIND WITNESSES WHO CAN TESTIFY ABOUT THESE OFFICERS, THEIR OPINION OF REPUTATION AND –

THE COURT: THAT SIMPLY IS IMPEACHING EVIDENCE OF A NATURE THAT IS NOT SUFFICIENT TO WARRANT A NEW TRIAL.

[51] NOW, IF THEY ARE INDICTED AND CONVICTED OF PERJURY, THEN IT SEEMS TO ME THERE CLEARLY IS.

MR. JOHNSTON: YOUR HONOR, UNDER 608(B), WE CAN ALSO ASK THEM THE QUESTION ON CROSS EXAMINATION WHETHER OR NOT THEY DID THIS, REGARDLESS.

THE COURT: YES; AND, IF THERE WERE A NEW TRIAL BEFORE THERE HAD BEEN ANY RESOLUTION OR FINAL JUDGMENT IN CRIMINAL THE PROCEEDINGS, WHICH COULD BE TWO OR THREE YEARS OFF, THEN IT SEEMS TO ME THEY COULD RAISE THE FIFTH AMENDMENT AND THAT WOULD BE UNFAIR TO THE GOVERNMENT, TOO, BECAUSE IT COULD WELL BE THAT THEY WOULD HAVE EVENTUALLY BEEN ACQUITTED.

MR. JOHNSTON: WHAT ABOUT FAIRNESS TO MY CLIENT? HOW DO WE KNOW THAT THEIR CONVICTIONS OR THE LACK THEREFORE ARE GOING TO BE THE RESULT OF JUSTICE AS OPPOSED TO REALIZING THAT IF THEY ARE CONVICTED SOMEBODY GOES FREE BY VIRTUE OF THAT. DON'T YOU THINK IT IS GOING TO IMPACT ON THE STATE'S ATTORNEY OFFICE THE CONSEQUENCES OF FULLY PROSECUTING THESE OFFICERS? HOW DO WE KNOW THAT DOWN THE ROAD THEIR CONVICTION OR LACK WILL HAVE ANYTHING TO DO WITH WHETHER THEY COMMITTED THESE ACTS? MAYBE IT WILL BE A MATTER OF EXPEDIENCY OR A POLITICAL SITUATION.

THE COURT: WELL, IT USUALLY HAS SOMETHING TO DO WITH IT, ONE HOPES. IN A RATIONAL SYSTEM OF JUSTICE, CONVICTION HAS SOMETHING TO DO WITH WHETHER YOU COMMITTED THE ACT.

MR. JOHNSTON: WELL, YOUR HONOR, I DON'T THINK THAT [52] IS FAIR TO MY CLIENT.

THE COURT: OTHERWISE, WHY HAVE TRIALS AT ALL?

MR. JOHNSTON: WHY ARE WE GOING TO LET MY CLIENT'S ABILITY TO CROSS-EXAMINE THESE OFFICERS REST ON POLITICAL DECISIONS MADE BY –

THE COURT: BECAUSE IT COULD WELL BE THAT UNDER RULE 403, TO WHICH 608(B) IS SUBJECT, THAT, IF SOMEBODY HAS BEEN ACQUITTED OF CRIMINAL CONDUCT OR THE CHARGES HAVE BEEN

NOL PROSSED OR STETED, THAT THE DANGER OF UNFAIR PREJUDICE IS OUTWEIGHED BY THE PROBATIVE VALUE.

MR. JOHNSTON: THAT'S EXACTLY MY POINT. THE NOL PROS OR STETED PART HAS NOTHING TO DO WITH WHETHER OR NOT THESE OFFICERS ARE IN FACT GUILTY OF THESE OFFENSES.

THE COURT: SUPPOSE THEY ARE ACQUITTED?

MR. JOHNSTON: WELL, THAT IS A WHOLE DIFFERENT MATTER.

THE COURT: IT IS A WHOLE DIFFERENT MATTER.

MR. JOHNSTON: THE IMPEACHMENT VALUE OF THIS EVIDENCE IS VALUE NOW, AND I WISH I COULD GO INTO THE COURT AND MAKE A RECORD OF ALL OF THE DIFFERENT KINDS OF IMPEACHMENT VALUE THAT THIS STUFF HAS. MY SUBPOENAS WERE QUASHED, AND I CAN'T DO THAT.

THE COURT: I'M GOING TO TELL YOU, YOUR SUBPOENAS WERE QUASHED BECAUSE AT THIS JUNCTURE I DON'T THINK THAT IT IS RELEVANT. YOU ARE DEALING IN THE AREA OF – CERTAINLY, IF THE [53] TRIAL WERE HELD TODAY, YOU COULD IMPEACH. THE QUESTION OF WHETHER A NEW TRIAL OUGHT TO BE GRANTED, THOUGH, IS WHETHER EVENTS TO DATE HAVE SO SHOWN THAT THE COURT'S CONFIDENCE IN THE TRIAL IS UNDERMINDED [sic].

NOW, I WILL HEAR YOUR FOR ABOUT TWO MORE MINUTES, AND THEN I AM GOING TO RULE ON THIS.

MR. JOHNSTON: YOUR HONOR, WHEN YOU MADE YOUR RULING QUASHING MY SUBPOENA, YOUR RULING WAS I THOUGHT A VERY SOUND RULING IN THE SENSE I INTERPRETED THAT RULING, AND THAT RULING SOUNDED TO ME LIKE A MAN WHO IS BALANCING THE CONCERNS OF THE STATE IN INVESTIGATING THESE OFFICERS, MAYBE FINDING MORE OFFICERS, MAYBE FINDING OFFICER HOPSON. THE FAIRNESS TO THE DEFENDANTS IN THAT CASE FOR THE YEAR OR MAYBE LESS THAT THEY MAY DO IN JAIL AND THE FAIRNESS TO MY CLIENT, WHO FACES NOW NINETEEN YEARS IMPRISONMENT WITHOUT PAROLE, AND THE PROPER BALANCING I THOUGHT THE COURT WAS MAKING AT THAT TIME WAS TO QUASH THE SUBPOENAS, LET THAT INVESTIGATION TAKE PLACE, BUT NOT PENALIZE THE DEFENDANT FOR THAT AND GIVE HIM A NEW TRIAL AND LET SKILLED COUNSEL TRY TO MAKE SOMETHING OF THE IMPEACHMENT VALUE OF WHATEVER WE HAVE THERE.

NOW, YOUR HONOR, WE ARE NOT ALLOWED TO GO INTO IT, AND I THINK THE COURT RULED AT THAT TIME, AND IT'S RIGHT HERE IN YOUR OWN RULING, THAT THE DEFENSE CAN CERTAINLY PRESENT A COGENT MOTION FOR NEW TRIAL WITHOUT ACTUAL INSPECTION OF THE RECORDS IN QUESTION.

[54] THE COURT: THAT'S RIGHT.

MR. JOHNSTON: AND YOU WENT ON ABOUT HOW WE COULD DISRUPT A SERIOUS INVESTIGATION. THEN YOU GO ON TO SAY THAT THIS IS DEFINITELY GROUNDS FOR A NEW TRIAL AND THE COURT MOST LIKELY WILL GRANT A NEW TRIAL EVEN THOUGH THE GENERAL RULE THAT IMPEACHMENT EVIDENCE DISCOVERED DOES NOT WARRANT A NEW TRIAL.

YOU TALK IN YOUR OWN RULING ABOUT HOW THIS IS NO MERE IMPEACHING TIDBIT, HOW THIS IS IMPORTANT EVIDENCE; AND I THOUGHT WHEN THE COURT OVERRULED IT THAT YOU SAID A NEW TRIAL MOTION CAN BE BASED UPON THE SIMPLE FACT THAT THE OFFICERS HAVE BEEN INDICTED. YOU SAID THAT: AS HE NOTED ABOVE IN THIS RULING, AND WHAT YOU WERE SAYING THERE, YOUR HONOR, AT THAT POINT IN TIME I THOUGHT WAS FAIR, AND THAT WAS WE KNOW ENOUGH NOW TO GRANT YOU A NEW TRIAL. IF THE STATE WANTS TO QUASH THAT BECAUSE OF THEIR INTERESTS, THAT IS FINE, BUT WE ARE NOT GOING TO PENALIZE THE DEFENDANT FOR IT. NOW YOUR HONOR SEEMS TO BE PROPOSING THAT MY CLIENT'S FAIRNESS BE THE SUBJECT WHATEVER DECISION, POLITICAL OR OTHERWISE, MAY BE MADE BY THE CITY STATE'S ATTORNEY OFFICE, AND THAT IS NOT FAIR. THAT IS JUST NOT FAIR. WE ARE TALKING ABOUT TWO OFFICERS WHO MAY FACE ONLY SUSPENSE.

THE COURT: WELL, IT'S A SAD DAY WHEN THE GOVERNMENT IS OF THE UNITED STATES IS IN

HERE WITH WITNESSES WHO HAVE BEEN INDICTED FOR PERJURY. IT'S A SAD DAY. IT IS A SAD DAY.

[55] ALL RIGHT. THANK YOU, MR. JOHNSTON. HAVE A SEAT.

I AM GOING TO RECESS THIS PROCEEDING. WE HAVE ALREADY DRAGGED ON FOR AN HOUR AND A HALF WITH WHAT SHOULD HAVE BEEN A TWENTY MINUTE SENTENCING, AND IT HAS GOTTEN SO COMPLICATED IT IS BEYOND BELIEF, AND NOW WE HAVE THIS NEW TRIAL ISSUE TO DEAL WITH, AS WELL, AND I AM GOING TO THINK ABOUT THIS FOR A COUPLE OF MINUTES, AND THEN I AM GOING TO GIVE YOU A RULING. I'M GOING TO RULE ON IT ONE WAY OR THE OTHER, AND THEN YOU CAN ALL TAKE IT UP TO RICHMOND AND DO WHAT YOU WANT.

COURT STANDS IN RECESS.

(AFTER RECESS:)

THE COURT: ALL RIGHT, I HAVE CONSIDERED THIS MATER AND I AM GOING TO GRANT A NEW TRIAL TO THIS MAN.

MY CONFIDENCE IN THE OUTCOME OF THIS TRIAL IS SO SEVERELY UNDERMINED BY THE INDICTMENT OF THE TWO KEY WITNESSES FOR PERJURY THAT I CANNOT, IN FAIRNESS AND JUSTICE, LET THIS VERDICT STAND.

AS I COMMENTED, I THINK IT IS A SAD DAY FOR THE GOVERNMENT OF THE UNITED STATES WHEN ITS KEY WITNESSES IN A CASE HAVE BEEN INDICTED FOR PERJURY; AND, AT THIS POINT, NO

MATTER – YOU CAN'T PREDICT HOW THE THING IS GOING TO COME OUT, BUT I THINK CERTAINLY UNDER RULE 608(B) THAT IS EVIDENCE THAT CAN BE USED ON CROSS-EXAMINATION AND CAN BE GONE INTO AND THERE MAY BE A WHOLE LOT OF OTHER EVIDENCE THAT CAN COME OUT [56] ABOUT THE CONDUCT OF THESE OFFICERS; AND, THEREFORE, THIS – THE PRESENCE OF REASONABLE DOUBT MAY BE, IN THE MINDS OF THE JURY, VERY MUCH AFFECTED BY KNOWING ABOUT OTHER THINGS THAT THESE OFFICERS ARE ACCUSED OF OR HAVE IN FACT DONE.

I DON'T KNOW WHAT THEY HAVE DONE, AND I DON'T KNOW ALL OF THE DETAILS OF THESE EVENTS. IT COULD BE THE JURY COULD DECIDE THAT WHAT THEY ARE CHARGED WITH IN THESE INCIDENTS THAT PREDATED THIS TRIAL ARE TRIFLING AND NOT IMPORTANT; AND, FRANKLY, AS A READ THE INDICTMENT, THEY LOOK SORT OF TRIFLING, BUT THEY MAY NOT BE TRIFLING – I MEAN, IN TERMS OF WHAT A JURY WOULD DO.

AND IN THIS CASE, FOR THE REASONS STATED BY JUDGE BUTLER IN HIS DECISION, WHICH REALLY IS ONE OF THE FEW THAT IS ON THIS POINT, I THINK – CERTAINLY THINK A NEW TRIAL IS WARRANTED. THIS IS THE DECISION IN ATKINSON, 429 F. SUPP. 880, EASTERN DISTRICT OF NORTH CAROLINA, 1977.

NOW, I WILL FIND, BASED ON THE AFFIDAVIT OF MR. SIMS, THAT THERE WAS NO BRADY VIOLATION HERE. AND I HAVE LOOKED OVER THE MATERIAL AND I CERTAINLY DON'T SEE ANYTHING THAT EXISTED BEFORE TRIAL FROM THE FILES THAT HAVE BEEN EXAMINED BY MR. SIMS AT MY REQUEST TO INDICATE THAT THERE WAS A BRADY VIOLATION. HOWEVER, OBVIOUSLY, IF I HAD KNOWN NOW WHAT – THEN WHAT I KNOW NOW ABOUT THESE OFFICERS, I PROBABLY WOULD HAVE ALLOWED THE SUBPOENAS OF THEIR POLICE RECORDS, THEIR PERSONNEL RECORDS OR OTHER MATTERS, BUT IT MIGHT NOT HAVE [57] TURNED UP ANYTHING BECAUSE UNDER THE BRADY AFFIDAVIT MR. SIMS PUT IN THERE WASN'T ANYTHING THERE PRIOR TO THE TRIAL, BUT THERE SURE IS NOW; AND, SENTENCING GUIDELINES OR NO SENTENCING GUIDELINES, ARMED CAREER CRIMINAL ACT OR NO ARMED CAREER CRIMINAL ACT, CRIMINAL LAW REVOLUTION OR NO CRIMINAL LAW REVOLUTION, OPERATION TRIGGERLOCK OR NO OPERATION TRIGGERLOCK, THE BASIC RULE IS THAT WE DO HERE WHAT IS FAIR, JUST, AND RIGHT.

IT MAY WELL BE THAT MR. CUSTIS IS A BAD INDIVIDUAL; IT MAY WELL BE THAT MR. CUSTIS IS GUILTY, BUT HE HAS GOT THE RIGHT TO AN EVEN PLAYING FIELD, TO A LEVEL PLAYING FIELD; AND I THINK THAT TO PRESERVE THAT RIGHT A NEW TRIAL HAS TO BE GRANTED HERE IN THE INTEREST OF FAIRNESS AND JUSTICE.

IF YOU LOOK AT WHAT IS HAPPENING OVER IN ENGLAND, IN BRITAIN, RIGHT NOW, BECAUSE OF

POLICE MISCONDUCT IN THE SEVENTIES IN CONNECTION WITH THE I. R. A., WHICH RESULTED IN MANY PEOPLE GOING TO JAIL ON PERJURED POLICE TESTIMONY – I AM NOT SAYING THERE WAS ANY PERJURY HERE. I AM NOT SAYING THAT, IT IS UP TO THE JURY TO DECIDE WHETHER THESE INDIVIDUALS SHOULD BE BELIEVED OR WHETHER THEY TOLD THE TRUTH BEFORE. I DON'T KNOW WHETHER THEY DID OR NOT, BUT WHAT I AM SAYING IS THAT – AND THE REASON I BRING UP THIS ENGLISH OR BRITISH EXAMPLE IS THAT WHAT IS GOING ON THERE IS THAT THE CONFIDENCE OF THE PUBLIC, OF THE BRITISH PUBLIC, IN THE INTEGRITY OF THE JUDICIARY IS WHAT HAS BEEN UNDERMINDED.

[58] THERE HAS BEEN UNDERMINING OF CONFIDENCE CERTAINLY IN THE POLICE DEPARTMENT AND IN THE HOME SECRETARIAT, BUT PEOPLE ARE CALLING FOR TREMENDOUS REFORMS IN THE JUDICIARY, BECAUSE THEY ARE SAYING HOW COULD THE JUSTICE SYSTEM ALLOW SOMETHING LIKE THIS TO HAPPEN; AND, BECAUSE OF THESE THINGS, WE SEE PROBABLY THOUSANDS OF YEARS, OR HUNDREDS OF YEARS, CERTAINLY, OF CONFIDENCE THAT HAD BEEN BUILT UP LIKE BY ACCRETION, SLOWLY OVER HUNDREDS AND HUNDREDS OF YEARS, CONFIDENCE IN THE INTEGRITY OF THE BRITISH JUDICIARY IS NOW GOING RIGHT OUT THE WINDOW WITH THE BATH WATER IN CONNECTION WITH THE PERJURED POLICE TESTIMONY THAT WAS DONE IN AN EFFORT TO GET THE I.R.A. UNDER CONTROL, AND THIS SHOULD NOT HAPPEN IN THIS

COUNTRY. I WILL NOT TOLERATE IT. I WILL NOT TOLERATE EROSION OF PUBLIC CONFIDENCE IN THE JUDICIARY IN THIS COUNTRY, AND I THINK THAT THE FACT THAT THE KEY WITNESSES FOR THE UNITED STATES GOVERNMENT IN THIS CASE HAVE BEEN INDICTED FOR PERJURY IS SO IMPORTANT AND SO SIGNIFICANT THAT IT OUGHT TO RESULT IN A NEW TRIAL IN THIS CASE IN THE INTEREST OF FAIRNESS AND JUSTICE; AND, THEREFORE, I WILL AWARD A NEW TRIAL.

ALL RIGHT. I WILL PREPARE A SIMPLE ORDER IN CHAMBERS THAT AWARDS THE NEW TRIAL AND GRANTS THE MOTION.

NOW, OBVIOUSLY, THIS IS APPEALABLE. IN 1984 THE GOVERNMENT GOT THE RIGHT TO APPEAL A NEW TRIAL; AND, UNLIKE A NEW TRIAL IN A CIVIL CASE, I THINK THE NEW TRIAL APPEAL CAN BE TAKEN BEFORE A NEW TRIAL IS HAD. IS THAT RIGHT?

[59] MR. SIMS: I THINK THAT IS RIGHT.

THE COURT: I THINK IT CAN, BECAUSE THE NEW TRIAL, OBVIOUSLY, SINCE IT IS AN APPEALABLE ORDER, THE FINAL ORDER RULE DOESN'T GOVERN.

IN CIVIL CASES, A NEW TRIAL ORDER IS NOT APPEALABLE UNTIL AFTER THE SECOND TRIAL IS HELD, BUT I THINK IN THIS CASE IT IS APPEALABLE, WHICH MEANS THAT, IF THERE IS A NEW TRIAL – AND I AM CERTAIN THE GOVERNMENT IS GOING TO APPEAL IT. I MEAN, UNLESS I AM SADLY MISTAKEN,

THE GOVERNMENT IS GOING TO APPEAL THIS, AND I CAN UNDERSTAND WHY THEY WOULD APPEAL IT.

SO, THIS IS PROBABLY MEANINGLESS, BUT I AM GOING TO GO AHEAD AND SCHEDULE THE NEW TRIAL ANYWAY WITHIN THE SEVENTY DAYS OF THE SPEEDY TRIAL ACT.

I WILL SCHEDULE IT TENTATIVELY FOR MAY THE 18TH AT 10:00 A.M. RETRIAL OF MR. CUSTIS IS SET FOR MONDAY, MAY THE 18TH, 1992 AT 10:00 A.M..

IS A JURY TRIAL STILL ELECTED?

MR. JOHNSTON: YES, YOUR HONOR.

THE COURT: ALSO WE ARE GOING TO – I WILL REHEAR THE MOTIONS TO SUPPRESS, BECAUSE MY CONFIDENCE IN THE OUTCOME OF THE MOTIONS TO SUPPRESS IS ALSO OBVIOUSLY SHAKEN BY THE FACT THAT THESE INDIVIDUALS HAVE BEEN INDICTED.

DOES THE GOVERNMENT REQUEST THAT THE TRIAL BE HELD BEFORE ANOTHER JUDGE OF THE COURT?

MR. SIMS: I DON'T SEE ANY REASON FOR THAT.

[60] THE COURT: DO YOU, MR. JOHNSTON?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THEN I WILL SCHEDULE IT IN FRONT OF MYSELF.

ALL RIGHT. I WILL ENTER THE ORDER IN CHAMBERS TODAY.

ANYTHING ELSE?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: MR. CUSTIS, OF COURSE, IS GOING TO BE HELD IN DETENTION PENDING A NEW TRIAL UNDER 3142. THERE IS NO REASON TO CHANGE THE CONDITIONS OF RELEASE IN THIS CASE.

ALL RIGHT, THEN. THAT IS WHERE THE MATTER STANDS. JUDGMENT WILL BE ENTERED TODAY OR MONDAY AND THE NEW TRIAL ORDER WILL BE ENTERED EITHER TODAY OR MONDAY. THEY WILL BOTH BE ENTERED ON THE SAME DATE FOR THE PURPOSES OF YOUR APPEAL.

I THINK IT WOULD BE – CERTAINLY BECAUSE OF THE NATURE OF THE QUESTIONS RAISED, COUNSEL MIGHT WISH TO SUGGEST TO THE FOURTH CIRCUIT THAT THEY EXPEDITE THE APPEAL IN THIS CASE FOR A LOT OF REASONS, BUT I WILL LEAVE THAT UP TO YOU.

YES, SIR?

MR. JOHNSTON: YOUR HONOR, I WOULD LIKE TO MAKE A FORMAL REQUEST FOR A BOND OR A REHEARING ON MY CLIENT'S RELEASE CONDITIONS AT THIS TIME.

THE COURT: THE MOTION IS DENIED. IN VIEW OF THE NATURE OF THE OFFENSE, HIS BACKGROUND AND CONDUCT, UNDER [61] SECTION 3142

AND 3143(B) THIS MAN SHOULD REMAIN DETAINED PENDING A NEW TRIAL.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. OBVIOUSLY, ANY DETENTION TIME HE HAS HAD FROM THE BEGINNING UNTIL, IF HE EVENTUALLY IS CONVICTED WITH A JUDGMENT THAT STANDS, WILL BE CREDITABLE ENTIRELY AGAINST HIS SENTENCE.

ALL RIGHT, COURT STANDS IN RECESS.

(THEREUPON, AT 11:20 O'CLOCK A.M., AN ADJOURNMENT WAS HAD IN THIS MATTER.)

* * *

AO 245 S(Rev. 4/90) Sheet 1 – Judgment in a Criminal Case

United States District Court
___ District of MARYLAND.

[Filed March 9, 1992]

UNITED STATES OF AMERICA

V.

DARREN J. CUSTIS

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: S-91-0334
Thoms M. DiBiagio, AUSA
Tyler Johnston, AFPD
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____.

X was found guilty on count(s) *1 (one), 3 (three) after a plea of not guilty. *Guilty as to the lesser included offense in Count 1.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1)	Poss. with intent to distr. a quant. of a mixt. of Cocaine		*1
18:922(g)(1)	Poss. of a Firearm by a Convicted Felon		3

*Guilty as to the lesser included offense in Ct. 1, 21:844(a) Poss. of CDS.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 2 (Two) and is discharged as to such count(s).

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $75.00, for count(s) 1 & 3, which shall be due _ immediately X as follows: To be paid during his period of imprisonment.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

___FILED ___ENTERED
___LODGED ___RECEIVED

MAR 9 1992

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
CRIMINAL DEPUTY

Defendant's Soc. Sec. No.: 216-78-9057

Defendant's Date of Birth: 2/14/65

Defendant's Mailing Address:

c/o Baltimore City Jail
401 E. Eager St., Balto., Md. 21202

Defendant's Residence Address:

4006 Maine Avenue
Baltimore, Maryland 21207

March 6, 1992
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer

FREDERIC N. SMALKIN, JUDGE U.S. DIST. CT.
Name & Title of Judicial Officer

March 9th, 1992 @ 1015 a.m.
Date

AO 245 S (3/88) Sheet 2 – Imprisonment

Defendant: DARREN J. CUSTIS Judgment – Page 2 of 3
Case Number: S-91-0334

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two hundred Thirty-five (235) months as follows:.

Two hundred Thirty-five (235) months as to Count 3, and Twelve (12) months as to Count I (lesser included offense), concurrently.

_ The Court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district,

_ at ____ a.m.
_ at ____ p.m. on _____.

_ as notified by the Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

_ before 2 p.m. on _____.

_ as notified by the United States Marshal.

_ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S (Rev. 4/90) Sheet 3 – Supervised Release

Defendant: DARREN J. CUSTIS Judgment – Page 3 of 3
Case Number: S-91-0334

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_ The Defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendants shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement.

United States District Court.
D. Maryland.

UNITED STATES of America

v.

Darren CUSTIS.

Crim. No. S 91-0334.

March 16, 1992.

Defendant was found guilty of possessing cocaine and being a felon in possession of a firearm. At sentencing, the defendant sought to challenge prior convictions and made a motion for a new trial. The District Court, Smalkin, J., held that: (1) the defendant, who was being sentenced as an armed career criminal, could not collaterally attack prior convictions on the ground that he did not receive effective assistance of counsel, and (2) the interest of justice required granting a new trial after the arresting officers who had testified against the defendant were indicated for perjury in unrelated cases.

Motion for new trial granted.

MEMORANDUM OPINION

~~SMALKIN, District~~ Judge.

This criminal case under the Armed Career Criminal Act, 18 U.S.C. § 924(e) is before the Court on issues regarding the sentencing of Mr. Darren Custis and his motion for new trial.

First, Mr. Custis has challenged the constitutional validity of his prior convictions, arguing, *inter alia*, that he was denied effective assistance of counsel, as set forth

in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as to two of his prior convictions. Mr. Custis contends that these convictions cannot be used to sentence him as a thrice-convicted armed career criminal. Thus, before addressing the arguments on the merits as to the various points raised by counsel going to the validity of the prior convictions, this Court examined the circumstances in which collateral attack should be allowed on prior convictions under 18 U.S.C. § 924(e). From its analysis, this Court now concludes that, with one narrow possible exception, collateral attacks on prior convictions should not be entertained at sentencing, for reasons that will be explained herein.

This opinion will also address the defendant's motion for new trial, based upon newly discovered evidence concerning the veracity of two Government witnesses. Specifically, two of the police officers who testified at the suppression hearing and at trial, and whose testimony constituted the principal evidence in support of Mr. Custis' conviction for possession of a firearm, have been indicted for perjury arising in the course of their work in an unrelated case. The indictments were filed after the trial in this case, but before sentencing. The defendant argues that this new information concerning the officers seriously undermines confidence in the jury's guilty verdict on the firearms count in the present case. The Government, in turn, rejects the notion that a new trial should be granted upon these grounds. Because this Court finds that the law and the equities in this case support the grant of a new trial, defendants new trial motion will be granted, as explained further below.

Factual Background

Mr. Custis was tried by jury in November of 1991 on a three-count indictment charging him with (1) possessing, with the intent to distribute, cocaine, (2) carrying a firearm in connection with a drug trafficking offense, and (3) possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year. At trial, three Baltimore City police officers testified on behalf of the Government. Two of the officers, Christopher Wade and John Mohr, originally arrested the defendant on state narcotics and firearms charges. As part of "Operation Triggerlock," a federal prosecution was undertaken pursuant to 18 U.S.C. §§ 922 and 924. A third officer testified regarding the defendant's purported admissions concerning the firearm. During the trial, Mr. Custis testified on his own behalf, admitting to possession of a small amount of cocaine for his personal use, but denying ownership and/or possession of the gun. After a three day trial, the defendant was convicted of the lesser-included offense of possession of cocaine, as well as the felon-in-possession of a firearm charge, in violation of 18 U.S.C. § 922(g) and § 924(e)(1), but was acquitted of the charge of carrying a firearm during the commission of a drug trafficking crime.

In February 1992, as the result of an investigation into an unrelated, earlier case conducted by the Baltimore City State's Attorney's Office. Officers Wade and Mohr were indicted for misdemeanor perjury, arising from allegedly false statements in applications for search

warrants[1]. Subsequent to the indictment, defense counsel sought to obtain by subpoena all records regarding the state's investigation of these officers, as well as the officers' personnel records.[2] The purpose of the subpoenas was to determine whether or not those records contained information relevant to a motion for new trial. This Court subsequently quashed the subpoenas, pursuant to an Order requiring the prosecutor to submit an affidavit stating that, upon review, the records contained no *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), exculpatory information (including impeachment information) extant before the trial of Mr. Custis. The Court received the requisite affidavit prior to the sentencing hearing, and finds, on the basis of that affidavit and its attachments, that there was no violation of *Brady*[3] in the present case.

Collateral Attack on Prior Convictions Used to Calculate Armed Career Criminal Status

The Government here requests application of the Armed Career Criminal enhancement of 18 U.S.C. § 924(e) to Mr. Custis. The defendant must have been

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[1] Perjury, although a misdeameanor under Maryland's common law classification of offenses, is punishable by 10 years imprisonment. Md. Ann.Code of 1957 art. 27, § 439 (1992).

[2] Prior to trial, the defendant had also moved *ex parte* for subpoenas for the police officers personnel records. Those motions were denied, on the ground that the defendant had presented no particularized showing justifying the issuance of those subpoenas.

[3] No information was contained in the files requested by defense counsel prior to trial that would have been exculpatory to the defendant under *Brady*.

convicted of three prior violent felonies to trigger the enhancement, which raises the penalty for the felon-in-possession of a firearm charge under § 922(g) from a maximum of ten years to a minimum of fifteen years, with a maximum of life. 18 U.S.C. § 924(e)(1). Under U.S.S.G. § 4B1.4, the minimum possible guideline sentence is 188 months. Unlike the statutory scheme for enhancement of sentences in drug cases, the Armed Career Criminal Act provides no statutory right to challenge prior convictions relied upon by the Government for enhancement. *Compare* 18 U.S.C. § 924(e) *with* 21 U.S.C. § 851. Thus, the only relevant question is the extent to which any other statute, the Constitution itself, or case law gives the defendant such a right.

The only statute conceivably relevant is 18 U.S.C. § 3661, which provides simply that the Court may consider any relevant information at sentencing. That statute does little to shed light upon the present situation.

The Constitution, as interpreted by the Supreme Court, appears to prohibit use of prior convictions to enhance sentences only where the convictions are void because the defendant was deprived of the opportunity to retain counsel, or, being indigent, was deprived of the opportunity to have counsel appointed. In other words, the conviction cannot be used to enhance only if it was obtained in violation of the rule in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (For reasons that follow, even this narrow prohibition may not apply in § 924(e) cases.)

This Court knows of no binding authority on the point from the United Sates Court of Appeals for the Fourth Circuit. Other circuits have addressed the issue of collateral attack upon prior convictions at sentencing and have allowed defendants to challenge prior convictions on constitutional grounds other than deprivation of the right to counsel, without specifically addressing the origin and nature of the "right" to raise the challenge, but simply allowing it to proceed. *See, e.g., United States v. Day*, 949 F.2d 973, 980-81 (8th Cir.1991). This Court's analysis of *Day* and the cases collected therein, though, leads to the conclusion that, to the extent the cases have extended the rule of *Tucker* and *Burgett* to entertain collateral attacks in cases not involving the frank deprivation of the right to any representation by counsel, they are unsound.

For example, the passage from *Tucker*, 404 U.S. at 448-49, 92 S.Ct. at 592-93, relied upon in *Day*, 949 F.2d at 981, simply does not extend to guilty pleas in which counsel has incompetently performed; rather, *Tucker* concerned itself only with defendants who had been cut off from any right to counsel at all. A guilty plea that can be attacked on ineffective representation grounds is very different from a situation where the defendant never was afforded the right to see a lawyer at all, but was nonetheless convicted. It is only the latter situation that is so fundamentally unfair that a resulting conviction cannot be used for enhancement later under *Tucker*. *See United States v. Graves*, 554 F.2d 65, 82 (3d Cir. 1977), *cited with approval in Grandison v. Warden*, 580 F.2d 1231, 1240-41 (4th Cir. 1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979).

Furthermore, and most importantly, the decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), should be read as foreclosing *any* collateral attack, whether before conviction on the § 924(e) underlying gun offense or at sentencing for it, on a predicate conviction, even where the predicate conviction could otherwise be challenged under *Tucker* and *Burgett*. Although *Lewis* did not directly involve § 924(e), it construed a gun control statute (since repealed) essentially *in pari materia* with § 924(e)'s base offense (18 U.S.C. § 922(g)), *viz.*, 18 U.S.C.App. former § 1202(a). If, as it appears, a conviction void under *Tucker* could be used as a predicate for convicting someone of the substantive firearms offense under *Lewis*, *a fortiori* it can be considered at sentencing on that offense, immune from collateral attack. This Court recognizes that *Lewis*, 445 U.S. at 67, 88 S.Ct. at 922, distinguished *Burgett* but that distinction is neither logically supportable nor persuasive. If the "void" prior conviction is "reliable" enough to support indictment and conviction, it is logically "reliable" enough to be a predicate for an enhanced sentence.

Additionally, this Court's basis for precluding collateral attack at sentencing (on grounds other than, possibly, total deprivation of counsel) includes the persuasive arguments made by Judge Wilkinson in his dissent in *United States v. Jones*, 907 F.2d 456 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 683, 112 L.Ed.2d 675 (1991). Judge Wilkinson's cogent dissent need not be reiterated here save to point out that, if the scope of collateral review of state court convictions in a federal sentencing proceeding extends to any and all constitutional flaws, then the sentencing court will most likely be conducting a

plenary collateral review of up to three predicate convictions in every sentencing under § 924(e), without any state court post-conviction record, and without the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Such a situation is folly, for the reasons stated by Judge Wilkinson in dissent in *Jones*. 907 F.2d at 470-84.

Finally, a word about *Jones* itself. *Jones* is not binding authority in this case, because it involved only construction and application of a (since repealed) provision of the Sentencing Guidelines, and it did not announce a supervisory or constitutional rule of general application in federal sentencings; neither does this Court consider *Jones* persuasive authority in this situation, for reasons amply stated above.

Thus, because defense counsel cannot establish that Mr. Custis, in his prior convictions, was denied the right to be represented by counsel (in fact, he was so represented), there is no occasion for any collateral review of those convictions at all during the sentencing proceedings. This Court is not, for reasons stated above, concerned with "ineffective representation" claims under the Sixth Amendment. Fourth Amendment claims, or claims of any sort other than the outright deprivation of the right to be represented under *Gideon*. Even if a predicate conviction was completely uncounseled, it is the opinion of the Court that *Lewis* would still bar collateral attack upon it, but that is a question upon which judgment need not be rendered in this case.

Motion for New Trial

Federal Criminal Rule 33 delineates the standard for a motion for new trial and provides, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice."

The Government, in its opposition to defendant's motion, correctly points out the general rule in this Circuit that new evidence going to the credibility of witnesses normally does not justify a new trial. *See, e.g., United States v. Stockton,* 788 F.2d 210, 220 (4th Cir.), *cert. denied,* 479 U.S. 840, 107 S.Ct. 147, 93 L.Ed.2d 89 (1986). The present case, however, goes well beyond the normal one, where some impeaching tidbit is turned up after trial. Indeed, this case is much closer to *United States v. Atkinson,* 429 F.Supp. 880 (E.D.N.C.1977). There, the court noted:

> Newly discovered evidence that merely goes to impeach the credibility of a prosecution witness does not ordinarily warrant the granting of a new trial. . . . but in some circumstances the newly discovered evidence, although impeaching[,] is sufficiently important in the ascertainment of the truth and in the interests of justice that a new trial should be ordered.

Id. at 885 (citations omitted). In the present case, this Court's confidence in the outcome of this trial is so severely undermined by the indictment of the two key witnesses for perjury that, in fairness and justice, the verdict cannot stand.

Officers Wade and Mohr were the arresting officers in the present case; the jury's belief in their testimony regarding Mr. Custis' possession of the firearm was, in the Court's opinion, essential to a finding of guilt. Of course, during the new trial, the defendant cannot introduce evidence of the officers alleged perjury under Fed.R.Evid. 609 unless and until the officers have actually been convicted of that offense. Under Fed.R.Evid. 608(b), however, the underlying circumstances would be open to cross-examination, subject, of course, to Rule 403 and Fifth Amendment constraints. In the discretion of this Court, the full extent of the officers misconduct, if any[4], could be addressed during cross-examination. The presence of reasonable doubt in the minds of the jury may be very much affected by knowledge of the conduct of these officers, and a different verdict may result. *See Atkinson,* 429 F.Supp. at 887. The Court has considered that another officer testified as to allegedly incriminating oral statements made by the defendant the morning after his arrest, before he had seen a magistrate, and after he had been held in custody all night. This questioning violated a general order of the Police Department, and the whole testimony of that officer is such that it does little to repair the Court's shaken faith in the integrity of the verdict.

It is a sad day when the government's key law enforcement witnesses in a criminal case stand indicated for perjury. While it may be true that the defendant is in fact guilty, our system of justice is designed to insure him the

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[4] Of course, the Court does not purport to have detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact.

right to a fair trial, where the jury knows all the relevant facts, especially when the credibility of arresting officers is at issue. In order to preserve that right, a new trial must be granted here in the interests of fairness and justice.[5]

For the reasons outlined above, an order will be entered separately, *granting* defendant's motion for new trial.

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[5] The Court is especially cognizant of the decrease in public confidence in the judiciary of England occasioned by recent revelations of police perjury during the 1970's, resulting from attempts to control the Irish Republican Army ("I.R.A."). This crisis of confidence in the independence and integrity of the English courts has led to demands for radical reform of the very mother of all common law courts. Trust in the English judiciary that had been built up by accretion – slowly over hundreds of years – is now going right out the window due to suspicion of police perjury. This court cannot and will not tolerate even the hint of a like erosion of public confidence in the judiciary of this country. Sentencing Guidelines or no Sentencing Guidelines. Armed Career Criminal Act or no Armed Career Criminal Act, War on Drugs or No War on Drugs, Operation Triggerlock or no Operation Triggerlock, the basic principle underlying this Court's judgments must be to do that which is fair, just, and right.

United States Court of Appeals.
Fourth Circuit.

UNITED STATES of America.
Plaintiff-Appellant.

v.

Darren J. CUSTIS. Defendant-Appellee.

UNITED STATES of America.
Plaintiff-Appellee.

v.

Darren J. CUSTIS. Defendant-Appellant.

Nos. 92-5211. 92-5212.

Argued Dec. 4, 1992.

Decided March 22, 1993.

As Amended April 6, 1993.

Order Denying Rehearing and Rehearing En Banc April 30, 1993.

After defendant's conviction for possession of firearm and possession of cocaine, the United States District Court for the District of Maryland. Frederic Nelson Smalkin, J., 786 F.Supp. 533, granted new trial, and government appealed. Defendant cross-appealed sentence enhancement. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) subsequent indictment of police officer witnesses for perjury did not entitle defendant to new trial; (2) trial court could refuse to entertain constitutional challenges to predicate state convictions for sentencing as armed career criminal; and (3) attempted breaking and entering was "violent felony" for sentence enhancement purposes.

Affirmed in part, reversed in part, and remanded with instructions.

Before RUSSELL and WILKINSON, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

In this case, Darren Custis claims (1) that he is entitled to a new trial on the basis of newly discovered impeaching evidence: (2) that he is entitled to have the constitutionality of several predicate state convictions considered in his federal sentencing proceeding; and (3) that his prior conviction for attempted breaking and entering should not have been defined as a violent felony for purposes of the sentencing enhancement under 18 U.S.C. § 924(e). For the reasons that follow, we reverse the district court's granting of a new trial and remand this case with instructions to reinstate the judgment of conviction. We find no error, however, in that court's treatment of the defendant's predicate state convictions, nor in its determination that defendant was eligible for sentence enhancement as an armed career criminal. We thus affirm the sentence imposed upon defendant.

I.

Darren Custis was arrested on July 1, 1991 by Baltimore City Police Officers Christopher Wade and John Mohr. Pursuant to "Operation Triggerlock," a federal effort to crack down on the use of firearms by convicted felons. Custis was indicted by a federal grand jury on

three counts: (1) possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1); (2) use of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The government gave notice that it would seek an enhanced penalty for the section 922(g)(1) offense under 18 U.S.C. § 924(e)(1), which provides for a minimum fifteen-year sentence for defendants who have three prior convictions for a violent felony or a serious drug offense. The notice listed state convictions for burglary, attempted burglary, and robbery as predicate offenses for the sentence enhancement.

At trial, three Baltimore City Police Officers testified on behalf of the government; the arresting officers. Christopher Wade and John Mohr, and an officer who interviewed Custis the morning after his arrest, Louis Hopson. Wade testified that at around 5:00 P.M. on July 1, he and Mohr approached the intersection of Springhill Avenue and Towanda, an area known to be the site of extensive drug dealing. Four or five individuals were standing on the corner in front of a convenience store, the Springhill Market. As the officers approached, one of the individuals called out "5-0," a warning that police officers were nearby. Custis went into the Springhill Market, and the officers followed.

Wade testified that he heard a "loud thump" just before he entered the store. As he entered, Custis was coming up from a crouched position between two video machines. Wade ordered Custis to stop and told Mohr, who was entering behind him, to hold Custis. Wade then investigated the area where Custis had been standing and

found a .38 caliber Smith & Wesson revolver. The officers then arrested Custis. As he was being arrested, Custis dropped a small bag of cocaine and said "OK, you got it." Wade then looked around the video machines, where he found eighteen additional bags of cocaine. Custis asked Wade for what he was being arrested, and Wade told him that he was being arrested for possessing cocaine and a handgun. According to Wade, Custis responded. "I will take the cocaine charges but I'm not taking the gun charge." Officer Mohr largely corroborated Wade's testimony.

Officer Hopson testified that he interviewed Custis the morning after his arrest. According to Hopson, Custis initially denied that the gun and drugs were his, but he later admitted that the gun was his and that he worked as an "enforcer" for a drug dealer named "Easy." Hopson did not take a written statement from Custis.

Custis testified on his own behalf. He admitted purchasing the one bag of cocaine in his possession when he was arrested, but denied possessing the gun or the remaining eighteen bags of cocaine. Custis claimed that he had dropped the one bag of cocaine and was picking it up when Wade stopped him. Custis acknowledged that he told Wade he would take the drug charge but not the gun charge. Custis claimed, however, that he meant only the one bag of cocaine that he dropped while being arrested. Custis also denied telling Hopson that the gun was his or that he worked as an "enforcer."

The jury found Custis not guilty of possession with intent to distribute and not guilty of use of a firearm during a drug offense, but found him guilty of possession

of a firearm and simple possession of cocaine, a lesser included offense of the charge of possession with intent to distribute cocaine.

After trial, but before sentencing, Officers Wade and Mohr were indicted in state court for perjury in securing a search warrant in an unrelated case. That indictment alleged that the officers had falsely stated that a substance suspected to be cocaine had been submitted to the Evidence Control Section of the Baltimore City Police Department for chemical analysis. The evidence had not been submitted until after the warrants had been obtained and executed. Based on this indictment. Custis moved for a new trial. The district court deferred ruling on this motion until the sentencing hearing.

At the sentencing hearing, the government moved to have Custis's sentence enhanced under the Armed Career Criminal Act. 18 U.S.C. § 924(e), based on the prior convictions included in the notice of sentence enhancement. In response, Custis claimed that two of his prior convictions had been unconstitutionally obtained. He argued that his counsel for his 1985 burglary conviction was unconstitutionally ineffective and that his guilty plea was not knowing and intelligent. Custis also alleged that the 1989 conviction violated due process because he was not adequately advised of his rights before entering a plea. Custis further claimed that the 1989 conviction was for attempted breaking and entering rather than attempted burglary and thus was not a violent felony. The district court declined to hear Custis's arguments that two of his prior convictions had been unconstitutionally obtained, and found that all three convictions were for violent felonies, thus making him eligible for the sentence

enhancement under section 924(e)(1). *United States v. Custis*, 786 F.Supp. 533, 537 (D.Md.1992).

After determining Custis's sentence, the district court heard his motion for a new trial based on newly discovered evidence. Fed.R.Crim.P. 33. The motion was based on the perjury indictments of Wade and Mohr. Finding that the indictments sufficiently undercut the credibility of those officers so as to justify a new trial, the district court granted Custis's motion. 786 F.Supp. at 538.

Subsequent to the district court's grant of the new trial, however, the state entered a *nolle prosequi* (equivalent to a dismissal without prejudice) in the Circuit Court of Baltimore City dismissing all charges against Wade and Mohr. The government then filed a motion with the district court to reconsider its grant of a new trial, but because the government had already appealed that motion to this court, the district court concluded that it lacked jurisdiction over the government's motion.

We have before us now the government's appeal of the district court's grant of a new trial and Custis's cross-appeal of his sentence enhancement under section 924(e). We address these questions in turn.

II.

The district court granted Custis's motion for a new trial on the basis of the indictments of Mohr and Wade for perjury in an unrelated case. The standard for granting a new trial is well established in this circuit:

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir.1987) (quoting *Mills v. United States*, 281 F.2d 736, 738 (4th Cir.1960) (citations omitted)). On its face, the evidence offered by Custis fails to meet this standard – it is "merely impeaching." This circuit has emphasized that new evidence going only to the credibility of a witness does not generally warrant the granting of a new trial. *United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.1986) (citing *United States v. Williams*, 415 F.2d 232, 233-34 (4th Cir.1969)).

While we have found no exception in this circuit to the general rule that a motion for a new trial requires a defendant to establish *each* of the five elements, *see United States v. Chavis*, 880 F.2d 788, 793 (4th Cir.1989), we need not rule that there can never be such an exception. There may be an exceptional "rare case" that would justify granting a new trial solely on the basis of newly discovered impeachment evidence. *See United States v. Taglia*, 922 F.2d 413, 415-16 (7th Cir.1991) (noting possible exception, but finding requirements for exception not satisfied). The exceptional circumstances identified by the Seventh Circuit in *Taglia* were, however, quite narrow: "If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed

because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id.* at 415. This case does not fall into that narrow category.

The state proceeding against Mohr and Wade involved an unrelated case, with issues that had no bearing on those at Custis's trial. Although perjured testimony is a matter of serious concern – and is especially repugnant when committed by an officer of the state – we are not prepared simply to presume these officers guilty of criminal misconduct. The district court made no factual findings concerning the conduct specified in the indictments and admitted that it lacked "detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact." 786 F.Supp. at 538 n. 4. The charges against the officers thus remain mere allegations, inadmissible under Fed.R.Evid. 609, *see United States v. Dennis*, 625 F.2d 782, 798 (8th Cir.1980), although defendant contends the underlying circumstances might prove to be admissible during cross-examination under Fed.R.Evid. 608(b). *See United States v. Leake*, 642 F.2d 715, 718-19 (4th Cir.1981).[1] In addition, all

[1] The admissibility of this evidence seems problematic. There has never been any allegation in the unrelated case that the officers tampered with the evidence, failed to submit that evidence to the Evidence Control Section, or falsely represented the results of chemical analysis. Rather, the officers were charged with securing the search warrant before submitting the evidence for analysis. If the defendant raised this conduct on cross-examination, the government argues that it would be entitled to show in turn that the misstatements were inadvertent or

of the charges against the officers were dismissed after this appeal was taken, a factor which came too late for the district court to consider because it lacked jurisdiction. We are thus confronted on appeal with charges that are both unproven and unconnected to this case. It would not be appropriate to set aside the jury's verdict on such a basis.

The Second Circuit has emphasized that motions for a new trial based on impeaching evidence discovered after trial should be granted "only with great caution and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir.1992) (citation omitted). In order to grant such a motion, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (footnote omitted). Such a concern is not present here. The testimony of Officer Hopson, who was not named in the indictments, is illustrative. His testimony recounting Custis's confession strongly supported the testimony of Wade and Mohr – and the jury's conclusion that Custis possessed the gun. In addition, Custis's own testimony of the events at the Springhill Market was largely consistent with that of the officers. Custis admitted that he had gone into the store with the cocaine, that he was crouched down picking up the cocaine when Officer Wade stopped him, that Officer Wade searched

immaterial, and to offer evidence of the officers character. Custis's new trial might thus be sidetracked by a mini-trial on the allegations in the officers indictment. Admissibility under Rule 608(b) is subject to the balancing test of Rule 403, *see* Fed.R.Evid. 608 advisory committee's note, which requires that the probative value of the evidence not be substantially outweighed by the prospect of confusion or delay.

behind the video machines after stopping him, and that he told the officers that he would take the drug charge but not the gun charge. He differed with the officers only on the ultimate question of whether he possessed the gun and the eighteen bags of cocaine. The jury acquitted Custis of the intent to distribute charge, leaving only the question of the possession of the gun. The officers and Custis essentially agreed on the sequence of events leading up to Custis's arrest, and Custis's proximity to where the gun was found. Given these facts, we cannot say that the indictment was the sort of new evidence that "would probably produce an acquittal." *See Bales*, 813 F.2d at 1295. We conclude, therefore, that Custis has not established an exception to the general rule that the subsequent discovery of impeaching evidence does not justify a new trial.

III.

The district court enhanced Custis's sentence for his section 922(g) conviction under the Armed Career Criminal Act. 18 U.S.C. § 924(e)(1), because it found that he had three prior violent felony convictions. Custis claims that the district court erred when it refused to consider the constitutional validity of the challenged predicate convictions, one of which he claims was obtained in violation of his right to effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and two of which he claims were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The district court declined to take evidence on the validity of these convictions. Initially, the court reasoned that *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), held that predicate convictions obtained in violation of the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), cannot be used to enhance a sentence. The court then assured itself that Custis had been represented by counsel in his prior convictions and, thus, that there had been no violation of *Gideon*.

The fact that the court acted scrupulously in determining that Custis's right to counsel had been observed, however, did not oblige it to take evidence on Custis's three remaining claims. The *Gideon* violations at issue in *Burgett* and *Tucker* are different in kind from other constitutional errors, including those asserted by Custis here. When a defendant has been deprived of counsel, he has lost his ability to assert all his other constitutional rights, either because he is ignorant of those rights or because he lacks the background and experience to press them effectively. *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Absent counsel, the judicial system has no assurance that the prior conviction reliably establishes the defendant's guilt. *See Linkletter v. Walker*, 381 U.S. 618, 639 n. 20, 85 S.Ct. 1731, 1743 n. 20, 14 L.Ed.2d 601 (1965). Without the reliability, even the federalism concerns that ordinarily counsel deference by federal courts to the judgment of state courts must give way. *See Tucker*, 404 U.S. at 448, 92 S.Ct. at 592. In recognizing the duty of district courts to entertain claims of *Gideon* violations in federal

sentencing proceedings, we note that those claims will ordinarily lend themselves to facial review from the state court documents offered by the government to establish the conviction. The corresponding burden on courts and litigants should thus not be a heavy one. *See United States v. Jones*, 977 F.2d 105, 108 (4th Cir.1992) (*Jones II*) (uncounseled state court conviction is "prime example" of one "whose invalidity appears from available state court records.").

The same cannot be said, however, of the other claims pressed by Custis in his sentencing proceeding. Permitting defendants to challenge generally the constitutional validity of predicate convictions would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges. In this case, Custis raised no less than three separate constitutional challenges, all of them fact-intensive, to the validity of his prior convictions, which were several years old and which were from the state courts of Maryland. Requiring district courts to entertain such "first instance challenges to prior state convictions" poses a risk of unduly delaying and protracting the entire sentencing process. *Jones II*, 977 F.2d at 108-09. Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and temporarily distant presents considerable practical difficulties. Many of the challenges predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. *See Loper v. Beto*, 405 U.S.

473, 500, 92 S.Ct. 1014, 1027, 31 L.Ed.2d 374 (1972) (Rehnquist, J., dissenting). This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. *Jones II*, 977 F.2d at 109. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process. *Id.* Beyond these practical difficulties, permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism. It is true that in a federal sentencing proceeding the state is not asserting a direct interest in the validity of its conviction, but any "challenge to the validity of a state conviction implicitly questions in at least some part the integrity of the state's judicial process." *United States v. Gaylor*, 828 F.2d 253, 255 (4th Cir.1987). A final judgment of conviction thus commands respect, in whatever forum and for whatever purposes it has come under challenge. The admonition that "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983), is not one that is limited to federal habeas corpus proceedings. In federal habeas corpus, Congress has at least provided a forum for the collateral review of state convictions. In federal sentencing proceedings, by contrast, the statutory mandate for reviewing predicate state convictions is far murkier.[2] The application of "the usual

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[2] Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings. Nothing in 18 U.S.C. § 3661, which permits federal courts to consider any information concerning "the background, character,

constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion" is, as the district court recognized, more problematic, even assuming that the presence of a procedural bar could be readily ascertained and asserted. 786 F.Supp. at 537. Given that federal

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and conduct" of a defendant in sentencing, requires courts to entertain constitutional challenges to predicate convictions. *See United States v. Jones*, 907 F.2d 456, 466-67 (4th Cir.1990) (*Jones I*). Moreover, that statute is far less detailed than the federal habeas corpus procedures specified under 28 U.S.C. § 2254.

The Sentencing Guidelines also send conflicting signals on the propriety of entertaining constitutional challenges to predicate convictions. *Compare* U.S.S.G. § 4A1.2, comment. (n. 6) ("[S]entences resulting from convictions that a defendant shows to have been *previously ruled constitutionally invalid* are not to be counted.") (emphasis added) *with* U.S.S.G. § 4A1.2, comment. (backg'd) ("The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."). Not surprisingly, the courts have reached conflicting results. *Compare United States v. Jakobetz*, 955 F.2d 786, 805 (2d Cir.1992) (courts have discretion to entertain challenges) *with United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir.1991) (sentencing courts may only entertain challenges to already invalidated convictions). Even those courts that have allowed district courts to entertain attacks on predicate convictions have emphasized that they are not required to do so, and that considerations of finality and federalism counsel restraint in doing so. *See United States v. French*, 974 F.2d 687, 701 (6th Cir.1992). Finally, the district court concluded that constitutional challenges to predicate convictions under the Armed Career Criminal Act were precluded by the Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). In that case, the Court held that collateral challenges were not permitted under the predecessor statute to the substantive offense under which Custis was convicted. 18 U.S.C. § 922(g). Given our disposition of this case, we need not consider the applicability of *Lewis* to Congress's 1984 amendment adding the sentencing enhancement provisions of 18 U.S.C. § 924(e).

sentencing proceedings are not the preferred forums for the review of state convictions, we have cautioned district courts that where a defendant has failed to attack his conviction on direct review or in a habeas corpus proceedings, his "failure to have made the attempt will bespeak a recognized lack of basis for doing so, thus raising in question the basis now claimed for making the attempt in an even more attenuated collateral setting." *Jones II*. 977 F.2d at 109.

For these reasons, we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant. *Cf. Rose v. Clark*, 478 U.S. 570, 577-79, 106 S.Ct. 3101, 3105-07, 92 L.Ed.2d 460 (1986) (citing introduction of coerced confession, complete denial of right to counsel, adjudication by biased judge, and direction of guilty verdict by court as constitutional violations where prejudice can be presumed). *But see Arizona v. Fulminante*, ___ U.S. ___, ___-___, 111 S.Ct. 1246, 1263-66, 113 L.Ed.2d 302 (1991) (applying harmless error analysis to introduction of coerced confession).

We now apply this test to the district court's resolution of Custis's claims. Custis claims that he was deprived of effective assistance of counsel during the proceedings leading up to his 1985 burglary conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to make out a claim of ineffective assistance of counsel, however, a defendant

must show that counsel's errors *prejudiced* his defense, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. *See also Perry v. Leeke*, 488 U.S. 272, 278-80, 109 S.Ct. 594, 599-600, 102 L.Ed.2d 624 (1989) (distinguishing *Strickland* claims requiring showing of prejudice from denial of counsel claims in which prejudice is presumed). Finding prejudice from counsel's alleged errors necessarily entails a fact-intensive inquiry, requiring extensive reference to the record in the original state proceeding. *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). The court in *Jones II* recognized this problem and pointed to ineffective assistance of counsel claims as "notoriously" fact-specific, and "difficult of proof under any circumstances." 977 F.2d at 111.

Custis also claims that two of his convictions were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). While prejudice to the defendant can be presumed on direct appeal when the record does not affirmatively demonstrate that the defendant's plea of guilt was knowing, *see id.* at 244, 89 S.Ct. at 1713, this presumption does not carry over when a defendant attacks the intelligence of his plea collaterally. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights." *Parke v. Raley*, ___ U.S. ___, ___, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992). *See also United States v. Timmrick*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (absent

showing of prejudice, Fed.R.Crim.P. 11 violation not cognizable in proceedings under 28 U.S.C. § 2255). When a defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attached in a habeas corpus proceeding. *Marshall v. Lonberger*, 459 U.S. 422, 437, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983). In order to rebut that strong presumption of validity, the defendant must make a factual showing that his plea of guilt was not voluntary and intelligent. The appropriate forum for such a fact-intensive inquiry will typically be a state collateral proceeding or federal habeas corpus, not a sentencing hearing for a separate offense far removed from the original conviction.

We conclude, therefore, that the district court did not err in declining to entertain Custis's constitutional challenge to the effectiveness of his counsel and to the validity of his guilty pleas. Those alleged violations did not carry with them the same presumption of prejudice that uncounseled pleas and convictions do. The multiple violations alleged by Custis could only have been established after fact-intensive investigations into state proceedings that are best undertaken in a different setting. Of course, if Custis is successful in making "a state or federal collateral attack upon the state sentence" during a habeas petition, for example, he may seek to revise any federal sentence in which the state conviction "was a factor." *Jones II*, 977 F.2d at 110 (citation omitted). No constitutional or statutory provision, however, obliges a federal sentencing court to entertain such challenges in the first instance.

IV.

Finally, Custis contends that his 1989 conviction in Maryland for attempted breaking and entering does not qualify as a violent felony for purposes of the sentencing enhancement in 18 U.S.C. § 924(e).[3] Custis contends that under Maryland law, attempted breaking and entering encompasses conduct such as lying in wait or reconnoitering the location of the crime. According to Custis, such conduct does not present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii), and thus his attempted breaking and entering conviction should not count as a violent felony for sentencing.

We disagree. The Supreme Court has instructed that the need for uniform sentencing under section 924(e) requires "a formal categorical approach, looking only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990). In applying such a categorical approach, we think that courts must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another. The Maryland crime of which Custis was convicted includes as an element that the

[3] While this appeal was pending, the Circuit Court of Baltimore County entered an order deleting from the court file for Custis's 1989 conviction all references to "attempted burglary" and substituting the words "attempted breaking and entering." Custis filed a motion to supplement the record on appeal to reflect this order and we granted Custis's motion on January 22, 1993.

breaking and entering be into "the dwelling house of another." Md. Ann.Code art. 27, § 31A. *See also Warfield v. State*, 315 Md. 474, 554 A.2d 1238, 1249 (1989) (§ 31A intended to prohibit breaking and entering into "another person's home"). Such a building is likely to be occupied, thus creating a substantial risk of confrontation. *Compare United States v. Headspeth*, 852 F.2d 753, 758-59 (4th Cir.1988) ("storehouse breaking", Md. Ann.Code art. 27, § 32, held not to present a threat by its very nature because crime generally involved unoccupied buildings).

In most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home. Interrupting an intruder while breaking into a home involves a risk of confrontation nearly as great as finding him inside the house. *United States v. O'Brien*, 972 F.2d 47, 52 (3d Cir.1992). We hold therefore that attempted breaking and entering "presents a serious potential risk of physical injury to another" and thus constitutes a violent felony for purposes of section 924(e)(2)(B)(ii). *Accord United States v. Payne*, 966 F.2d 4, 8 (1st Cir.1992) ("[R]isk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring."). *See also United States v. Lane*, 909 F.2d 895, 903 (6th Cir.1990) (attempted burglary). *But see United States v. Strahl*, 958 F.2d 980, 986 (10th Cir.1992) (holding that attempted burglary does not qualify as a violent felony for section 924(e)); *United States v. Martinez*, 954 F.2d 1050, 1054 (5th Cir.1992) (same).

V.

For the reasons given above, the case is remanded to the district court with directions to sentence defendant under 18 U.S.C. § 924(e) as an armed career criminal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORDER

Appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

In a requested poll of the Court on the suggestion for rehearing en banc. Chief Judge Ervin and Judges Hall, Phillips, and Murnaghan voted to grant rehearing en banc; and Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted to deny rehearing en banc.

This panel considered the petition for rehearing and is of the opinion that it should be denied. In denying rehearing and affirming the sentence imposed by the district court, the panel does not wish to be construed as condoning the district court's treatment of this circuit's precedent. The district court ruling preceded this circuit's decision in *Jones II* and the district court was thus without the benefit of its guidance. Regrettably, however, in the court [sic] of its discussion, the district court attempted improperly to reject the majority opinion in *Jones I*, and to draw upon the dissenting opinion in that case as authority for its position, 786 F.Supp. at 536-37. It should not need to be remarked that it is the opinion of the panel

majority that binds and governs district courts within this circuit.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority of active circuit judges voted to deny rehearing en banc.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Merhige (SUSDJ, ED/VA).

SUPREME COURT OF THE UNITED STATES

No. 93-5209

Darren J. Custis,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 12, 1993